IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 330

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. RECONSTRUCTION FINANCE CORPORATION, ETC., AND 210 OTHER RELATORS,

*Plaintiffs-Petitioners,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, SR., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, AND B. L. MAJEWSKI, AS MEMBERS, AND JAMES B. McCAHEY, AS MEMBER AND PRESIDENT,

*Defendants-Respondents.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.


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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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*Plaintiffs-Petitioners,*

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BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, SR., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, AND B. L. MAJEWSKI, AS MEMBERS, AND JAMES B. McCAHEY, AS MEMBER AND PRESIDENT,

*Defendants-Respondents.*

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Supreme Court of the United States:*

The People of the State of Illinois, on the relation of Reconstruction Finance Corporation, a corporation of the United States of America created by Act of Congress, and 210 other judgment creditors of the Board of Education of the City of Chicago, Illinois, a body politic and corporate, relators in a certain mandamus proceeding commenced in the Circuit Court of Cook County, Illinois, re-

spectfully pray that a writ of certiorari issue to the Supreme Court of Illinois directing that Court to certify to this Court the record in the case of *The People of the State of Illinois, ex rel. Reconstruction Finance Corporation, etc., et al.* v. *Board of Education of the City of Chicago, et al.*, No. 27497 in that Court, in order that the decision and judgment of said Court rendered May 11, 1944, may be reviewed by this Court, and the judgment reversed.

**Summary Statement of Matter Involved.**

April 28, 1939, Reconstruction Finance Corporation obtained a money decree in the Circuit Court of Cook County, Illinois, against the Board of Education of the City of Chicago, Illinois, for $128,913.50, in a suit for accounting for moneys received by said Board to the use of the corporation. (R. 10, 23.) At various times in 1938 and 1939, the other 210 petitioners recovered money decrees in similar suits for accounting. (R. 11, 15, 17, 26, 31.) The plaintiffs in these accounting suits were some of the hundreds of owners and holders of outstanding unpaid 1929 tax anticipation warrants issued and sold by said Board of Education, pursuant to Section 132 of the Illinois School Act, which limited the payment of the warrants solely from the anticipated taxes when collected, and which required that the taxes against which said warrants were drawn be set apart and held for the payment of said warrants. (App. p. 29.) Substantial sums were received into the treasury of said Board of Education from time to time as the proceeds of collections of the 1929 taxes against which said warrants were issued, but insufficient proceeds were received to pay all outstanding warrants in full. The Board of Education exhausted the funds by paying certain warrants in full of principal and interest to the exclusion of petitioners and other warrant holders. It was held in the accounting suits

that the proceeds of collection being insufficient to pay all warrants in full, all warrant holders were entitled to a pro rata distribution of the proceeds of collections received by said Board of Education and the decrees entered are for the pro rata amounts of the proceeds of collections received into the treasury of the Board of Education, with statutory interest upon said amounts for the periods distribution was withheld. (R. 23-26, 31-36.)

Prior to the entry of any decree in the State courts, a decree substantially like those held by petitioners was entered in an accounting suit commenced against said Board of Education by another unpaid warrant holder in the United States District Court for the Northern District of Illinois (See opinion of District Court, App. p. 22), and this decree was affirmed by the Court of Appeals for the Seventh Circuit. Reference was made to this case by the Supreme Court of Illinois in its first opinion in this group. (App. pp. 2, 3.)

November 13, 1942, no steps having been taken by the Board of Education to provide for the payment of these money decrees, despite timely and repeated demands, petitioners commenced an action for writ of mandamus in the Circuit Court of Cook County, Illinois. (R. 1.) The petition alleged the entry of the money decrees by Illinois courts of general jurisdiction in adversary proceedings in which the Board of Education appeared and made defense, the regularity of the proceedings in which such decrees were entered, that said decrees were final, unimpeached and unpaid and were valid subsisting obligations of said Board of Education, and that no provision had been made for their payment, nor had any attempt been made to bring about their payment. (R. 8-22, 37-39.) The petition prayed that a writ of mandamus issue commanding the Board and its officers to do every act and thing imposed upon them by law to bring about the payment of the several decrees,

to include said decrees in the Board's annual school budget and appropriation ordinance as provided by law and levy the necessary taxes in connection therewith, or issue its bonds as provided by statute and employ the proceeds of sale thereof to the payment of said decrees, or that such other and further or different relief be granted as the nature and exigencies of the cause should require. (R. 21, 37.)

The Board of Education and its officers answered, admitting the facts alleged but denying that the decrees were valid. It averred that the claims maintained against the Board of Education in the proceedings in which the decrees were entered were without merit and were not liabilities of said Board, that therefore the decrees should not have been entered, that the several courts exceeded their jurisdiction in so doing, and that the decrees had been impeached by the decision of the Supreme Court of Illinois in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497. (R. 40-52.) There was the further averment of the conclusion that all proceeds of collection of school tax levies for the fiscal year 1943 and all other revenue of the Board of Education for such year were necessary to meet the ordinary and necessary expenses of operating and maintaining the public schools of Chicago and that there were no excess revenues which could be applied in payment of any of the decrees. (R. 52-56.)

Relators moved to strike the answer and for judgment. (R. 60-62.) The motion was denied, the defenses were sustained, and judgment was entered dismissing the petition. (R. 62-63.) The Supreme Court of Illinois affirmed. (R. 66-78.)*

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* All record references are to the record in this case, *People, etc.* v. *Board*, unless otherwise indicated. It will be necessary to make some references to the record in the companion case, *Leviton* v. *Board* (entitled in this Court, *F. J. Lewis, Petitioner*, v. *Board of Education and Frank C. Leviton*), which is the ruling case of the group, and to the record in the other related case, *Hutchinson* v. *Board*, and when such references are made we shall so indicate.

**Statement of Jurisdictional Grounds.**

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code. (28 U. S. C., Sec. 344(b).) This cause, originated in the Circuit Court of Cook County, Illinois, and was reviewed on appeal by the Supreme Court of Illinois. The Circuit Court filed no opinion. The opinion of the Supreme Court was filed and judgment was entered March 21, 1944 (R. 66, 77,) but a petition for rehearing was filed (R. 78) and it was denied and the judgment became final May 11, 1944. (R. 95.) The opinion of the Supreme Court appears at pages 66 to 76 of the record and is reported at 386 Ill. 522, 54 N. E. (2d) 508.

It is claimed by petitioners that their decrees are property and that by denying to them their only available remedy of enforcement, their property in their decrees has been taken without due process of law and they have been denied the equal protection of the law in violation of Section 1 of Amendment XIV of the Constitution of the United States, by the decision and judgment of the Supreme Court of Illinois.

The decrees entered in the accounting suits in favor of these petitioners and against the Board of Education were entered by courts of competent jurisdiction, are final and unimpeachable and are immune from collateral attack in this mandamus proceeding. The Supreme Court of Illinois usurped judicial power and invaded the property rights of these petitioners in their decrees when it denied the conclusive effect of the decrees, went behind the decrees and the issues settled thereby and held that the claims upon which the decrees were entered were not valid claims against the Board. As a consequence the judgment of the Supreme Court deprived the petitioners of their property without due process of law and denied them the equal pro-

tection of the law, in violation of the Fourteenth Amendment.

The Supreme Court of Illinois failed or refused to pass upon the contentions of petitioners that their rights under the Constitution of the United States had been invaded, affirmed the judgment below upon non-federal grounds which are untenable and unsubstantial, and which are not of a character as made a decision of the federal questions unnecessary. This denied petitioners their day in court on the federal questions presented.

The result of the decision and judgment of the Supreme Court of Illinois is to deny to these petitioners their rights under the Constitution of the United States claimed and asserted at every available opportunity. The value of their decrees has been destroyed and they have been deprived of their property without due process of law and denied the equal protection of the law in violation of the Fourteenth Amendment.

**Statement of When and How the Jurisdictional Questions Were Raised and What Disposition Was Made of Them.**

The petitioners' motion in the Circuit Court to strike the answer of the Board of Education and for judgment affirmatively alleged that to sustain the defenses averred in the answer would be to deprive petitioners of their property without due process of law in violation of Section 1 of Amendment XIV of the Constitution of the United States. (R. 62.) The Circuit Court considered that the decision of the Illinois Supreme Court in *Leriton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497, was binding upon it and upon the parties, and overruled the motion of petitioners, sustained the defenses averred in the answer,

denied to petitioners the relief prayed in the petition, and dismissed the petition. (R. 63.)

On their appeal to the Supreme Court of Illinois, petitioners in their printed briefs assigned as error* and fully argued that the judgment of the Circuit Court deprived them of their property without due process of law contrary to Amendment XIV of the Constitution of the United States because:

(a) The judgment of the Circuit Court amounted to a vacation of petitioners' decrees, which relief the Court was without jurisdiction to grant after the decrees became final. (Brief, pp. 12, 21, 46; Reply Brief, pp. 19-21.)

(b) In holding in effect that petitioners' rights were adjudicated by the judgment of the Illinois Supreme Court in the case of *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497, to which none of them was a party and in which none was represented, the Circuit Court deprived petitioners of their day in court. (Brief, pp. 18, 42; Reply Brief, pp. 12-13.)

(c) The judgment of the Circuit Court deprived petitioners of all judicial means available to them of enforcing their decrees and destroyed the value of said decrees as property. (Brief, pp. 20-21, 46-48; Reply Brief, pp. 13-19.)

(d) In going behind the decrees and reconsidering the questions finally determined by said decrees, the Circuit Court usurped judicial power. (Brief, pp. 46-48; Reply Brief, pp. 19-21.)

The Supreme Court of Illinois did not pass upon these contentions of denial of rights claimed under the Consti-

* All briefs filed by the parties in the Supreme Court of Illinois have been certified to this Court. The practice of making formal assignments of error on the record on appeal does not obtain in Illinois. Instead, the grounds of appeal and questions sought to be raised on review are required to be set forth in appellants' brief, and it is sufficient if the errors relied upon for reversal clearly appear from an examination of the entire brief. *Swain* v. *Hoberg*, 380 Ill. 442, 44 N. E. (2nd) 38.

tution of the United States and the only indication in the opinion that the questions were noticed is the statement that "many other points are discussed in the able briefs of counsel, which we have carefully considered, but most of which have no application to the questions presented, and hence are not discussed in this opinion." (R. 76.)

In their petition for rehearing, these petitioners pointed out in detail their claims that rights guaranteed to them under Amendment XIV of the Constitution of the United States had been denied by the decision and judgment of the Supreme Court of Illinois, but this petition was denied without opinion. The petition directed the attention of the Court particularly to the following:

(a) Petitioners were denied their day in court and due process of law by the failure or refusal of the Court to pass upon the validity of the money decrees held by them. (R. 82, 92.)

(b) Petitioners were denied due process of law by the application to this case of the decisions in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497, and 385 Ill. 599, 53 N. E. (2nd) 596, which was litigation between the municipal corporation and its taxpayers, the interests of both being adverse to the interests of these petitioners, who were not parties to or represented by any party to said litigation. (R. 90-91.)

(c) Unlike the judgment creditor in *Brownsville* v. *Loague*, 129 U. S. 493, petitioners were not relying upon any remedy for enforcement of their decrees which was apart from the decrees themselves and the Supreme Court of Illinois in arbitrarily stating otherwise made and disposed of a case wholly different from the one actually before the Court and argued by the parties. (R. 83-86.)

(d) The Court misstated the rule of the many decisions relied upon by petitioners in their briefs, wherein the doctrine of the inviolability of final judgments against collateral attack was held to apply to judgments against municipal corporations of all varieties, even where the claims upon which the judgments were

entered were debts, obligations, or liabilities which the municipal corporations in question had no constitutional or statutory power to incur or were by such constitutions or statutes prohibited from incurring, and refused to enforce the rights and remedies vested in these petitioners by their decrees and deprived them of their property in their decrees without due process of law. (R. 87-88.)

(e) The Court by its decision and judgment failed and refused to afford to petitioners the same protection and advantage of the laws afforded to and enjoyed by other litigants under substantially like circumstances and having claims and rights substantially identical with those of petitioners, and so denied them the equal protection of the law. (R. 88-90.)

(f) The holding of the Court that the Board did not have the present ability to levy taxes to pay the decrees of petitioners, as an added ground of decision, is not a substantial independent ground of decision which makes it unnecessary to pass on the federal constitutional questions after the Court by its first ground of decision has destroyed the property of petitioners in their decrees by holding them unenforceable. (R. 91-93.)

## The Questions Presented.

The following questions arise upon the record and are in issue:

1. Did the Supreme Court of Illinois fail or refuse to decide federal constitutional questions presented and are the non-federal grounds of decision advanced by that Court untenable or unsubstantial or not of sufficient breadth to sustain the judgment without a decision of the federal questions?

2. Are the decrees entered in favor of petitioners against the Board of Education in their accounting suits property protected by the Fourteenth Amendment of the Constitution of the United States?

3. Have the decision and judgment of the Supreme Court of Illinois, which does not hold petitioners' decrees void but holds them to be unenforceable, plainly resulted in a denial to the petitioners of the rights guaranteed to them by the Fourteenth Amendment?

4. Did the Supreme Court of Illinois, by passing the constitutional questions presented and argued by petitioners by a mere statement that the questions had no application to what the Court said was the issue in the case and failing or refusing to decide the questions, deny to these petitioners their day in court on their rights claimed under the Constitution of the United States, and so deny to them due process of law?

5. Did the Supreme Court of Illinois, by holding that petitioners in their accounting suits sued on their tax anticipation warrants and sought to require the Board of Education to pay such tax warrants in whole or in part, thereby stating a case within *Berman* v. *Board of Education*, 360 Ill. 535, 196 N. E. 464, notwithstanding their complaints and the findings in the decree that petitioners' suits for accounting were for assigned and pledged tax moneys actually received into the treasury of the Board to petitioners' use, state and decide a case not before that Court and thereby usurp judicial powers and deprive petitioners of their property without due process of law?

6. Did the Supreme Court of Illinois find that petitioners were looking to some source other than their decrees for the right to bring about their payment, thereby stating a case within *Brownsville* v. *Loague*, 129 U. S. 493, notwithstanding petitioners' reliance solely on their decrees for their rights and the Board's duties, and state a case other than the one before it, and as a consequence usurp judicial powers and deprive petitioners of their property without due process of law?

7. Did the Supreme Court of Illinois go behind the decrees in the accounting suits and reconsider the questions conclusively determined by said decrees and decide, because of what it regarded as lack of merit in the claims on which the decrees were entered, that the decrees should never have been entered, and thereby usurp judicial power and destroy the vested rights of these petitioners in their decrees without due process of law and deny to petitioners the equal protection of the law?

8. Has the Supreme Court of Illinois, by its refusal to pass upon the validity of the money decrees of these petitioners, denied them their day in court on a question vital to enforcement of their property rights and so denied them due process of law?

9. Has the Supreme Court of Illinois, by its refusal to order the writ of mandamus, thereby taking from the petitioners their only remedy to compel payment of their decrees, deprived them of their property in these decrees without due process of law and denied to them the equal protection of the law?

10. Did the Supreme Court of Illinois, by its judgment, the effect of which was to release the Board of Education of its obligation to pay the decrees, take the property of petitioners and give it to the Board of Education and thereby deprive them of their property without due process of law?

11. Did the Supreme Court of Illinois, by deciding that the Board of Education was not under duty to account to these petitioners for their property received by said Board to their use, which it paid out to others, permit said Board to take the property of these petitioners without compensation, thereby depriving them of their property without due process of law?

12. Did the Supreme Court of Illinois deny to these petitioners the advantages of and redress afforded by the

principles of law, the presumptions and the remedies which had theretofore and have since been afforded to all other litigants in like circumstances and having claims substantially identical with those of petitioners, and so deny to petitioners the equal protection of the law?

**Reasons for Allowance of the Writ.**

1. The exclusive remedy for enforcing a money decree against a municipality is the compelling of the levy and collection of taxes or the issuance and sale of bonds authorized by statute to pay valid decrees and judgments, and this remedy for enforcing the decree is the life of the decree. (*Dist. of Columbia* v. *Eslin*, 183 U. S. 62, 65; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 291.) A judgment or decree is property as much protected by the Fourteenth Amendment as any other property. (*Collins* v. *Welsh*, 75 Fed. (2d) 894, 897 (C. C. A. 9th); *Penn. Co.* v. *Scott*, 346 Pa. 13, 29 Atl. (2d) 328, 329; *Casieri's Case*, 286 Mass. 50, 190 N. E. 118, 120.) While it is undoubtedly true that a court may in a collateral proceeding control the enforcement of a judgment, it is equally well settled that the control exercised must not be such as violates federal constitutional inhibitions. (*Com'rs. of Sinking Fund* v. *Philadelphia*, 324 Pa. 129, 188 Atl. 314, 316-318.) While it is settled that a court may inquire into the basis of a decree in collateral proceedings brought to enforce such decree to determine the nature of the causes of action and the claims conclusively adjudicated by the decree, it is equally well settled that no court has the judicial power or right to conduct a re-examination of the question of the validity or merit of the claims adjudicated by the decree, or of the propriety of the decree. (*Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721.) The refusal to award a writ of mandamus to petitioners in this case deprives them of their property in their decrees without due process of law. (*Loui-*

*siana* v. *Pilsbury*, 105 U. S. 278, 301; *Wolff* v. *New Orleans*, 103 U. S. 358, 364, 368; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 682; *Hodges* v. *Snyder*, 261 U. S. 600, 603.) The proposition is not to be denied, especially as it respects adjudication upon private rights of parties, that when these rights have passed into judgment they become absolute and are conclusively established against collateral attack and it is the duty of courts to enforce the judgment. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 431; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721.

2. The Supreme Court of Illinois, by refusing to grant the petitioners their only remedy to enforce their decrees against the Board of Education and relieving the Board of its obligation to pay the decrees and its duty to account, has taken the property of petitioners and given it to the Board without due process of law. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 80; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417; *C. St. P. M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162, 167; *Ochoa* v. *Hernandez*, 230 U. S. 139, 161.

3. The Supreme Court of Illinois, by going behind the decrees in the accounting suits and deciding that the Board of Education was under no contractual obligation to these petitioners with respect to the proceeds of the collections of taxes against which petitioners' warrants were issued, which were actually received by said Board to the use of these petitioners, permitted said Board to take the private property of these petitioners without compensation and thereby deprived them of their property without due process of law. *Ward* v. *Love County*, 253 U. S. 17, 24; *Panhandle Co.* v. *State Highway Commission*, 294 U. S. 613, 618; *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 234-235.

4. The Supreme Court of Illinois, by going behind the decrees and holding that the Board of Education is under no duty to account for or restore the money, compensation,

and property of petitioners which the Board arbitrarily and without authority appropriated and paid over to others, has countenanced the taking by an agency of the State of Illinois of the property of one private person and the giving of such property to another private person arbitrarily and without due process of law in contravention of the Fourteenth Amendment. *Ward* v. *Love County*, 253 U. S. 17, 24; *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 239, 240, 241; *Scott* v. *Toledo*, 36 Fed. 385, 395 (C. C. W. D., Ohio); *Davidson* v. *New Orleans*, 96 U. S. 97, 102; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417.

5. The Supreme Court of Illinois, by denying to these petitioners the conclusive effect of the decrees entered in the accounting suits and going behind these decrees after they had become final and were not reviewable, has usurped judicial authority and has deprived these petitioners of their property in their decrees without due process of law. *Voorhees* v. *Bank of United States*, 35 U. S. 449, 473; *Buckmaster* v. *Jackson*, 4 Ill. 104, 107, 110, 111; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721; *Knaus* v. *Chicago Title and Trust Co.*, 365 Ill. 588, 591, 7 N. E. (2d) 298, 300.

6. The effect of the holding of the Supreme Court of Illinois in this mandamus proceeding is that the judgments in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2d) 497, and 385 Ill. 599, 53 N. E. (2d) 596, are binding on these petitioners and amounts to an adjudication that their money decrees are unenforceable, and as a consequence deprives these petitioners of their property in their decrees without a hearing and denies them due process of law. *Hansberry* v. *Lee*, 311 U. S. 32, 40; *Garfield* v. *United States*, 211 U. S. 249, 262; *Pennoyer* v. *Neff*, 95 U. S. 714; *Durkin* v. *Hey*, 376 Ill. 292, 300, 33 N. E. (2d) 463; *Walter Cabinet Co.* v. *Russell*, 250 Ill. 416, 421, 95 N. E. 462, 464.

7. The Supreme Court of Illinois refused to these petitioners the advantages of and redress afforded by the

principles of law, the presumptions and the remedies which had theretofore been afforded to all litigants in like circumstances and having claims and decrees substantially identical with those of these petitioners, and denied to them the equal protection of the law, in violation of Section 1 of Amendment XIV of the Constitution of the United States. (*Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Truax* v. *Corrigan*, 257 U. S. 312, 333-336; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374.) The Court did not mention, directly or inferentially, *Moore* v. *Town of Browning*, 373 Ill. 583, 27 N. E. (2nd) 533; *People* v. *Village of Bradley*, 367 Ill. 301, 11 N. E. (2d) 415; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 183 N. E. 233; *Town of Lyons* v. *Coolidge*, 89 Ill. 529, and its many other decisions cited in the briefs of these petitioners holding that the decrees in the accounting suits were final and conclusive of every question within the issues of those suits and binding not only upon the Board but upon the courts as well, that the decrees could not be collaterally impeached irrespective of the nature and character of the claims finally and conclusively adjudicated by such decrees, that they were corporate obligations of the municipal corporation against which they were entered, and that the Board of Education could not escape making provision for their payment. These cases cannot be distinguished from the case of these petitioners. This action of the Supreme Court of Illinois is more than a mere erroneous decision or a mere failure to follow precedent. (*Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680-681.) It is plain that the result of the action of the Supreme Court of Illinois is that these petitioners are denied relief solely because their title to the fund for which the Board was ordered to account by the Circuit Court and the Superior Court of Cook County is evidenced by a contract called a tax anticipation warrant instead of by a like contract called by some other name. The fed-

eral constitutional rights and privileges of the citizen are not to be denied or impaired by anything so illusory. In considering whether citizens have been deprived of their constitutional rights this Court will be guided by realities and not by mere labels and, in so doing, will look to the fair result of the decision and action of a State court as bearing upon such constitutional rights. *Rogers* v. *Alabama*, 192 U. S. 226, 230.

8. The federal constitutional rights of petitioners, that they shall be accorded their day in court, that they shall be accorded equal protection of the laws, and that their property, rights and remedies shall not be impaired, interfered with, appropriated or taken by the State without due process of law, clearly and affirmatively asserted by petitioners at every stage of the proceedings in the State courts, have been sacrificed and denied to them by the refusal and failure of the Supreme Court of Illinois judicially to pass upon, declare and protect those rights, by the action of that Court in persisting in declaring and describing the claims and causes of action maintained by petitioners and conclusively judicially determined in their accounting suits, to be other than what such claims actually were and are, by the action of that Court in disposing of petitioners' mandamus proceeding upon a case made by the Court in its opinion and not upon the case made by the record on appeal and presented in the briefs of the parties, and by the action of that Court in disposing of the case before it upon unsubstantial, untenable, illusory, and patently erroneous non-federal grounds. *Gelpcke* v. *City of Dubuque*, 68 U. S. (1 Wall.) 175, 206; *Terre Haute, etc. R. Co.* v. *Indiana*, 194 U. S. 579, 589; *Ward* v. *Love County*, 253 U. S. 17, 22; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282; *Chapman* v. *Goodnow's Adm'r.*, 123 U. S. 540, 548; *Rogers* v. *Alabama*, 192 U. S. 226, 230; *Indiana* v. *Brand*, 303 U. S. 95, 100.

9. The sustaining of the defense of the Board of Education of its present inability to levy taxes to pay petitioners' decrees as an additional ground of its decision after the Supreme Court of Illinois had held that the decrees were not corporate obligations of the Board of Education and could not be enforced against it was not an independent ground of decision of sufficient breadth to sustain the judgment of that Court without a decision of the federal constitutional questions. The Fourteenth Amendment insures to the citizen the privilege of having his constitutional rights and immunities judicially declared and protected when properly invoked and this Court has the province to inquire whether the decision of the State court rests on a fair and substantial nonfederal ground or one merely illusory. (*Lawrence* v. *State Tax Com.*, 286 U. S. 276, 282; *Ward* v. *Love County*, 253 U. S. 17, 22; *Rogers* v. *Alabama*, 192 U. S. 226, 230.) While the Court may in a collateral proceeding control the enforcement of a judgment, it is well settled that the control exercised must not be such as violates the Fourteenth Amendment. *Com'rs. of Sinking Fund* v. *Philadelphia*, 324 Pa. 129, 188 Atl. 314, 317.

10. It will be in the interests of the proper administration of justice to grant a writ of certiorari in this case in order to correct a plainly untenable and erroneous decision of the Supreme Court of Illinois based on a misstatement of the undisputed facts. These judgment creditors have been compelled to contend with the Supreme Court of Illinois against theories advanced by the Court rather than with other litigants in the case. The Supreme Court of Illinois has arbitrarily stated the facts to suit its own purposes and has arbitrarily refused to apply principles of law to this case and companion cases, established by its own decisions and by the decisions of the courts of every American jurisdiction. In addition to the 211 petitioners, comprised of individuals, executors, trustees, receivers, banks, and insurance companies, re-

siding or having their places of business in twenty-two states and the District of Columbia, there are hundreds of other holders of outstanding unpaid tax anticipation warrants, some of whom have decrees like those of petitioners and some of whom have not yet obtained decrees. Not merely because of the large number of persons and the large amount of money involved, but because of the general public importance of the questions presented, which arise with great frequency, we believe this case to be of sufficient importance, of such general interest, and involving such substantial federal constitutional questions as to move this Court to grant this petition in the exercise of a sound judicial discretion.

Respectfully submitted,

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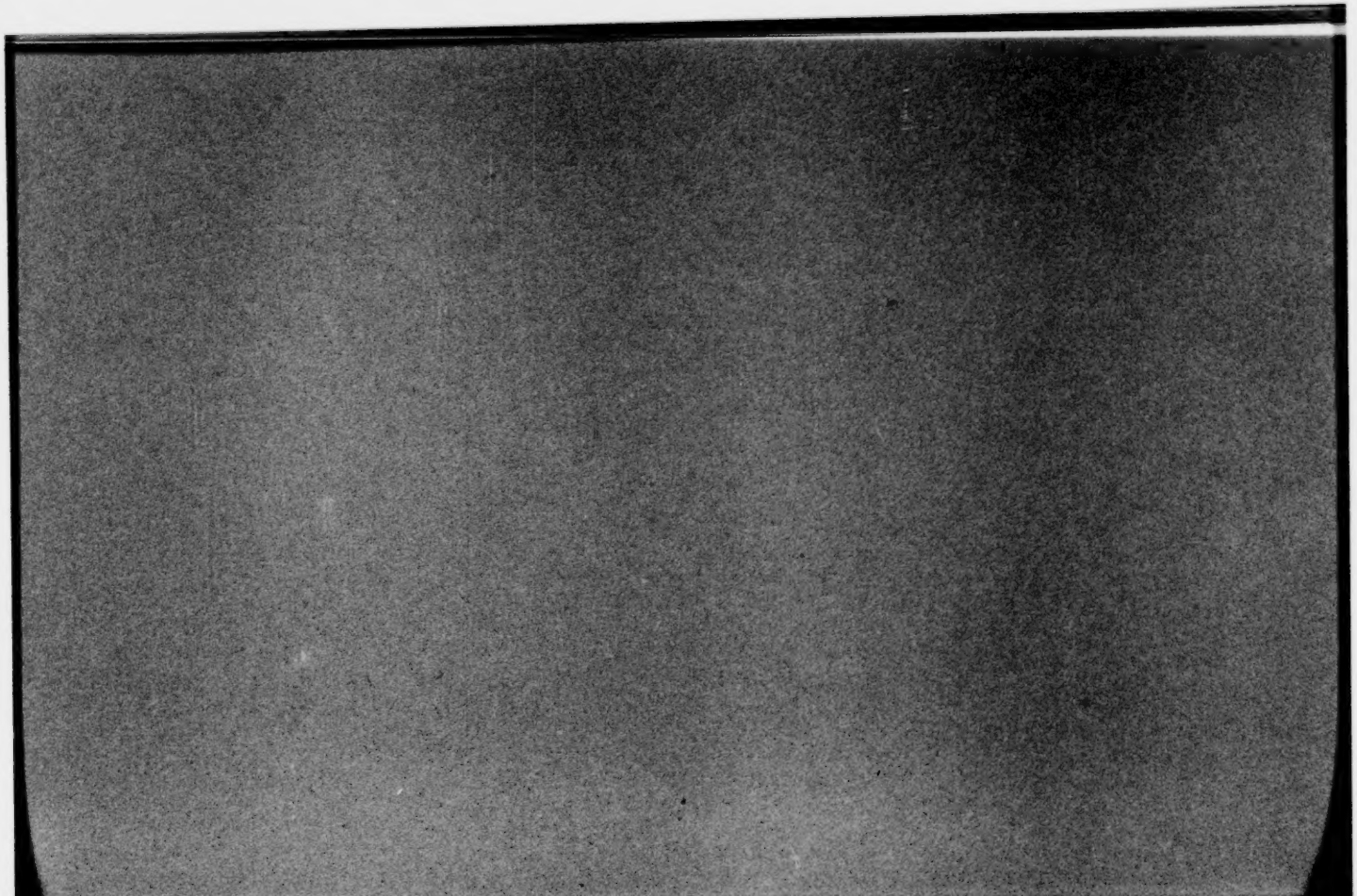
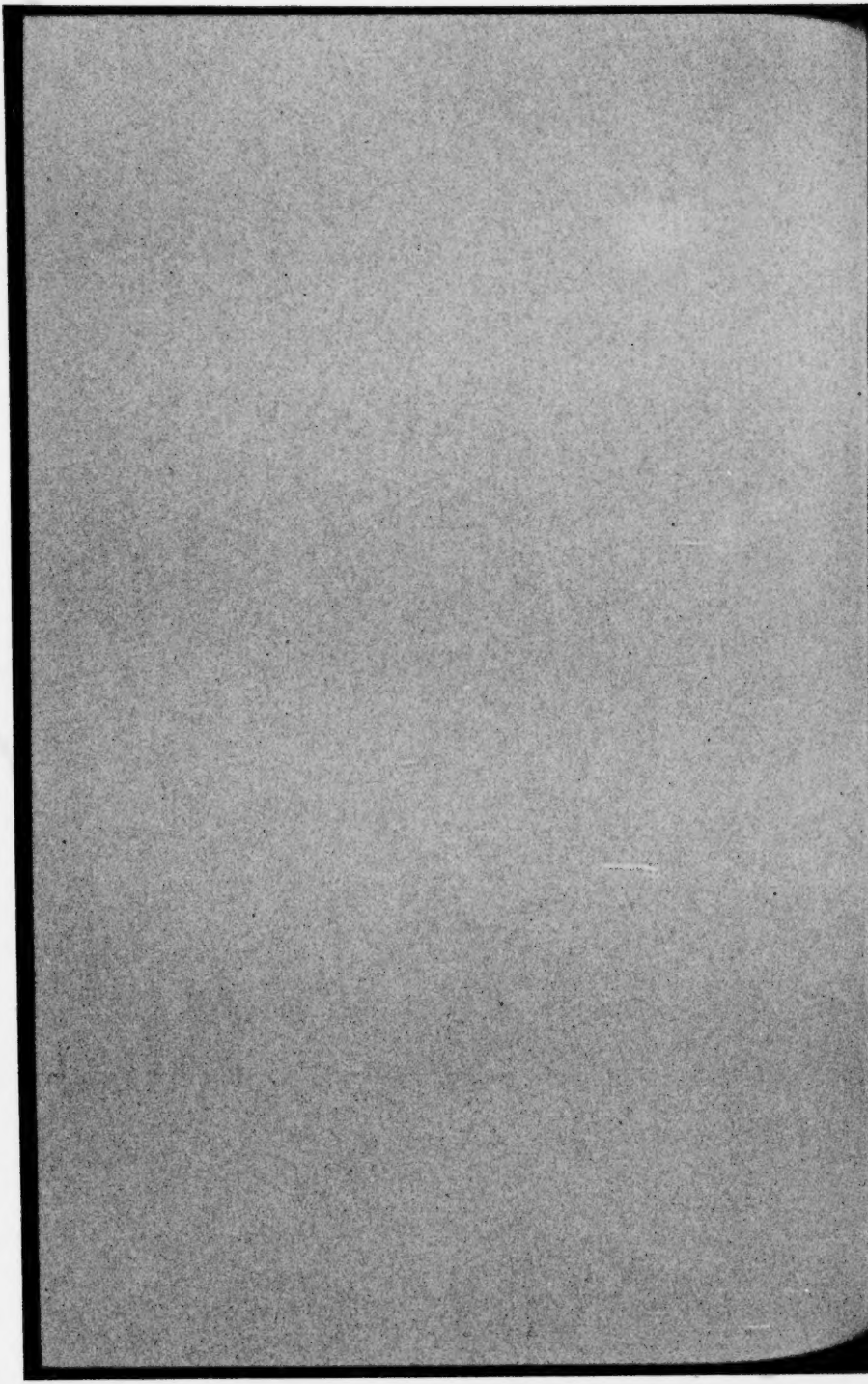
I have authorized the filing of the foregoing petition for writ of certiorari on behalf of Reconstruction Finance Corporation.

CHARLES FAHY,
*Solicitor General of the United States.*





IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

**No.** .....

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. RECONSTRUCTION FINANCE CORPORATION, ETC., AND 210 OTHER RELATORS,

*Plaintiffs-Petitioners,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, SR., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, AND B. L. MAJEWSKI, AS MEMBERS, AND JAMES B. McCAHEY, AS MEMBER AND PRESIDENT,

*Defendants-Respondents.*

## BRIEF IN SUPPORT OF PETITION.

### Foreword.

The grounds on which the jurisdiction of this Court is invoked and a statement of when and how the jurisdictional questions were raised and what disposition was made of them by the Supreme Court of Illinois appear in detail in the petition for writ of certiorari to which this brief is annexed and we do not repeat them here. The questions presented for decision and a summary statement of the reasons advanced for the allowance of the writ also appear in the petition. This brief is submitted for the purpose of showing that the federal constitutional questions presented are substantial, that the Supreme Court of Illinois

has failed to decide federal constitutional questions specifically presented and which were necessary to a determination of the case, that it usurped judicial powers by going behind the decrees and retrying issues settled by the decrees, that it failed to accord these petitioners the benefit of rights established by their decrees, and that the result of its decision is a denial of substantial rights of the petitioners claimed under the Constitution of the United States.

## Statement of the Case.

This is a mandamus proceeding to compel the Board of Education of the City of Chicago, Illinois, and its officers to do all acts and things imposed upon them by law to provide for the payment of decrees entered by the Circuit Court and the Superior Court of Cook County, Illinois, in accounting suits against said Board of Education in favor of these petitioners. There are two companion cases in which petitions for writs of certiorari are this day filed and which these petitioners and the petitioners in those cases ask be consolidated with this case. *Leviton* v. *Board of Education* (entitled in this Court, *F. J. Lewis, Petitioner*, v. *Board of Education and Frank C. Leviton*) is an injunction proceeding by a taxpayer of said school district to enjoin the issuance of judgment funding bonds to provide means for payment of a decree of another judgment creditor which is the same as those of petitioners, and *Hutchinson* v. *Board of Education* involves motions to vacate said decrees. So that this Honorable Court may have before it the whole picture as it was presented to the Supreme Court of Illinois and in order to make one brief serve to support the petitions in the three cases and avoid repetition of the facts common to all the cases, we state the facts in chronological order with appropriate references to the records in the three cases.

Where not otherwise indicated, the references will be to the record in this case.

*Hutchinson* v. *Board of Education* is one of the several accounting suits brought by holders of outstanding unpaid tax anticipation warrants, issued in 1929 by the Board of Education of the City of Chicago, against said Board of Education to recover their respective pro rata shares of the proceeds of collections of 1929 taxes against which said warrants were issued, which had been received by said Board to the use of said holders and which had not been paid to them. (R. 10.) The complaint in the *Hutchinson* case was filed September 29, 1936, (R. 1 in *Hutchinson* v. *Board*) and the decree was entered in that case April 13, 1938. (R. 11; also, R. 133 in *Hutchinson* v. *Board.*) There was no appeal from this decree and it became final thirty days after it was entered. November 19, 1942, said Board moved to vacate this decree and similar decrees entered against it in other suits and to dismiss the suits on the ground that the Supreme Court of Illinois in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497, decided after the decrees became final, had held that the decrees were void. (R. 48, 57; also, R. 176 in *Hutchinson* v. *Board.*) These motions were denied, the Board appealed in the seven cases and the appeals were consolidated for hearing. (R. 48; also, R. 182-183 in *Hutchinson* v. *Board.*) The Supreme Court of Illinois in the consolidated case, entitled *Chicago City Bank and Trust Company* v. *Board of Education*, 386 Ill. 508, 54 N. E. (2nd) 498, held that it had already decided in *Leviton* v. *Board of Education*, 385 Ill. 599, 53 N. E. (2nd) 596, that the decrees created no liability against the Board and could not be paid by it because of the limitations of Section 9 of Article IX of the State Constitution, and that the questions were moot, and dismissed the appeals in the several consolidated cases, including this case. Opinion, R. 185-196 in *Hutchinson* v. *Board.*

The background of this litigation appears from the record in the *Hutchinson* case. The Board of Education of the City of Chicago was created a body politic and corporate by the Act of April 20, 1917. (Laws of 1917, pp. 724-732; Smith-Hurd Stat. 1929, Chap. 122, Pars. 151-162 [Secs. 128-139 of School Act].) By that Act, it was placed under the control of a board of education and was given power to provide and manage the public school system of Chicago. (App. pp. 28-31.) Specifically, it was given power "when there is not sufficient money in the treasury to meet the ordinary and necessary expenses for educational and building purposes, to request the City Council, whose duty it thereupon shall be, to order issued warrants against and in anticipation of any taxes levied for the payment of the expenditures for educational and for building purposes to the extent of seventy-five per cent of the total amount of the taxes levied for such purposes; provided, however, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes against which said warrants are drawn shall be set apart and held for their payment." (Sec. 132; App. p. 29.) It is further provided that "All moneys raised by taxation for school purposes, * * * shall be held by the city treasurer, *ex-officio*, as school treasurer, in separate funds for school purposes, subject to the order of the board of education upon its warrants signed by its president and secretary and countersigned by the mayor and city comptroller," and that "The city treasurer shall, as school treasurer, secure and safely keep all such moneys, subject to the control and direction of said board of education." (Sec. 135; App. p. 30.) The Board is given broad powers for the establishment and maintenance of the public schools

of the City of Chicago and the Act provides generally that it shall exercise all the powers that may be requisite and necessary for its purposes. (App. p. 31.) The Board of Education of the City of Chicago is a body politic and corporate, separate from the City of Chicago, empowered to make contracts, require taxes to be levied for school purposes, issue tax anticipation warrants, and issue bonds, and is capable of suing and of being sued in any court of competent jurisdiction. (App. pp. 28-31.) See also, *Board of Education* v. *Upham*, 357 Ill. 263, 267, 191 N. E. 876, 878.

Pursuant to the authority granted by the statute creating it and enabling it to function as a public corporation, said Board in 1929 voluntarily and for its own benefit issued tax anticipation warrants against the taxes levied for 1929, and the petitioners are the owners and holders of some of those warrants. (R. 25, 33; also, R. 136-170 in *Hutchinson* v. *Board*.) Each warrant issued is signed by said Board of Education by its president and secretary and provides among other things: "The principal hereof and the interest hereon will be paid in lawful money of the United States of America from the proceeds of taxes when received, heretofore levied upon all of the taxable property in the City of Chicago for the year 1929 for educational [building] purposes. This warrant is issued in anticipation of said taxes so levied for the year 1929 for educational [building] purposes to provide a fund to meet and defray the ordinary and necessary expenses of the public schools of the City of Chicago and is payable, both principal and interest, solely from said taxes when collected and not otherwise, which taxes are hereby assigned and pledged to the payment of this warrant and of all warrants issued against and in anticipation of such taxes, the total of which warrants so issued does not exceed 75% of the tax levy made therefor and shall be received by any collector of taxes in payment of the taxes against which it was issued." (R. 15-17

in *Lewis* v. *Board.*) The statute places no duty on the treasurer with respect to tax anticipation warrants and he is not mentioned in the warrants here involved and had no contractual relations with the holders.

Pursuant to appropriate resolutions and ordinances and in strict accordance with the statute, said Board issued $63,175,000 of tax anticipation warrants for all purposes against the taxes levied for the year 1929. (R. 6, 48 in *Hutchinson* v. *Board.*) In making its levy the Board took into consideration the existing tax rate and the existing valuation of property in the district made by the regular quadrennial assessment in 1927. The Illinois State Tax Commission in 1928 ordered a reassessment of all real estate in Cook County and this delayed the extension of the 1929 taxes until the spring of 1931, two years after the warrants were issued. The reassessment resulted in a substantial reduction in the assessed valuation of taxable property in the district from that fixed by the regular 1927 quadrennial assessment in effect when the warrants were sold and there was no compensating increase in the rate at which taxes were to be extended. (R. 53-54 in *Hutchinson* v. *Board.*) The result was that at the time the 1929 tax levies were put in collection in the year 1931 the outstanding tax anticipation warrants issued in 1929 in compliance with the statutes against the 1929 tax levies, plus accumulated interest, exceeded the amount of the 1929 taxes which had been extended and which could be collected. As the proceeds of collections were received, the Board called for payment the outstanding warrants in the order of the numbers appearing on said warrants, and paid warrants in full to the exhaustion of the fund. (R. 25, 54, 63, 69, 134 in *Hutchinson* v. *Board.*) This left unpaid warrants of a face amount exceeding $10,000,000, which includes all warrants owned and held by these petitioners. (R. 25,

63, 65, 67 in *Hutchinson* v. *Board.*) Except for some small payments of interest made after the decision in *Board of Education* v. *Norfolk & Western Railway Co.*, 88 Fed. (2nd) 462 (C. C. A. 7th), and pursuant to a mandatory decree entered by the District Court on the mandate of the Circuit Court of Appeals, which are immaterial here, these petitioners have received no part of the proceeds of collections assigned and pledged to the payment of their warrants. (R. 105-107 in *Lewis* v. *Board.*)

The holders of the outstanding unpaid tax anticipation warrants brought suits for accounting (all on the same theory and substantially alike), alleging that their rights and interests were governed by the pertinent statutes in force at the time the warrants were issued and sold and by the contracts made by the Board of Education with such holders when they purchased the warrants. (R. 30-33 in *Hutchinson* v. *Board.*) The Board answered, averring that it had paid out all of the proceeds of collections of 1929 taxes and had nothing to distribute to the unpaid holders of tax anticipation warrants and that, under the decision of the Supreme Court of Illinois in *Berman* v. *Board of Education*, 360 Ill. 535, 196 N. E. 464, it was without constitutional authority to provide the means of accounting to the unpaid holders. (R. 75-76 in *Hutchinson* v. *Board.*)

There was an extended hearing and a decree was entered expressly finding all the issues against the Board and finding *inter alia* that said unpaid holders were entitled to the relief prayed and to recover of and from said Board of Education their respective pro rata shares of all moneys at any time received into the treasury of the Board as the proceeds of taxes collected on the tax levies of the said Board for school purposes for the year 1929 against which the tax anticipation warrants owned and

held by the plaintiffs in the accounting suits were issued, and it found that said Board had received into its treasury large amounts of money as the proceeds of such collections, that such funds should have been distributed pro rata among all the owners and holders of the outstanding warrants and not to some of them to the exclusion of others, that each tax warrant holder was entitled to receive his pro rata share, that the Board itself had appropriated and distributed such shares to others and that each unpaid holder was entitled to be reimbursed to the amount of his respective share. Money decrees were entered against the Board of Education for the respective pro rata amounts of the proceeds of the collections of the 1929 tax levies, with statutory interest. (Records: This case, pp. 23-25; *Lewis* case, pp. 47-50; *Hutchinson* case, pp. 133-175.)

After the decree was entered in the United States District Court for the Northern District of Illinois in *Norfolk & Western Railway Co.* v. *Board of Education*, and while the suits were pending in the Circuit Court and the Superior Court of Cook County, Illinois, but before decrees were entered in any of them, the Sixtieth General Assembly of Illinois, on July 12, 1937, passed an act authorizing the Board of Education of the City of Chicago to issue bonds to pay judgments (other than judgments for unpaid claims for school supplies, materials, or services rendered) which had been or which might be entered against it by courts of competent jurisdiction. (R. 37; App. pp. 31-32.) Pursuant to this statute, the Board, in September, 1939, sought to issue and sell $80,000 of its bonds for the purpose of paying the money decree obtained by F. J. Lewis, who is the petitioner in *Leviton* v. *Board of Education*, this day filed. (R. 42.) November 16, 1939, Frank C. Leviton, as a taxpayer, commenced his suit to enjoin the issuance of these bonds on the ground that the proceeds of the bonds were

to be used for the payment of a non-corporate obligation in violation of Section 9 of Article IX of the State Constitution. (R. 43; also, R. 1-15 in *Lewis* v. *Board.*) The motion of the Board to dismiss this complaint was sustained by the Circuit Court of Cook County, Illinois, and the suit was dismissed. (R. 43; also, R. 51 in *Lewis* v. *Board.*) On appeal, this decree was reversed. (App. pp. 1-11; *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497.)

When the case was redocketed in the Circuit Court, F. J. Lewis was allowed to intervene and answer the complaint on the ground that his decree in the accounting suit, entered against said Board April 1, 1939, was in jeopardy in the injunction proceeding between the Board and its taxpayers and that the interests of both the Board and its taxpayers were adverse to his interests. (R. 51-57 in *Lewis* v. *Board.*) By his answer he averred that his money decree was a valid and binding obligation of the Board and that to permit the taxpayers to maintain the injunction proceeding would substantially impair his decree and render it worthless, thereby depriving him of his property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States. (Ibid. R. 57-67.) Upon the conclusion of the hearing in the injunction proceeding, the Circuit Court, feeling itself bound by the dicta in the opinion in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497, enjoined the Board from issuing and selling the bonds to provide the means to pay the Lewis decree. (Ibid. R. 93-94.) Lewis appealed and in his brief attacked the opinion filed in the first appeal sentence by sentence, (see Lewis Brief, pp. 74-105, certified here,) pointing out that the Supreme Court of Illinois had based its opinion on assumed facts not supported by the record, and had disregarded the settled law of Illinois and had rested its decision on *Berman* v.

*Board*, 360 Ill. 535, 196 N. E. 464, a case presenting entirely different questions. Notwithstanding his appeal for a hearing on constitutional rights asserted, the decree enjoining payment of his decree was affirmed. *Leviton* v. *Board of Education*, 385 Ill. 599, 53 N. E. (2nd) 596; App. pp. 12-21.

Reconstruction Finance Corporation and other judgment creditors of said Board of Education, none of whom was a party to the *Leviton* case but whose decrees were put in jeopardy by this collateral attack upon the Lewis decree, filed this proceeding for a writ of mandamus in the Circuit Court of Cook County, Illinois, November 13, 1942. (R. 1.) There is no contention that the decrees entered in the accounting suits were not entered by courts of general jurisdiction in adversary proceedings upon appropriate pleadings and after a full hearing in which all interested parties participated, and in which all the defenses on the merits again raised by the Board in these mandamus proceedings, and all other pertinent questions were heard and decided. (R. 19, 49.) Notwithstanding this situation, the Supreme Court of Illinois in *People ex rel. Reconstruction Finance Corporation* v. *Board of Education*, 386 Ill. 522, 54 N. E. (2nd) 508, (R. 66-76), held that because the plaintiffs in the accounting suits were holders of unpaid tax anticipation warrants and their cause of action arose out of the fact that they did not receive their share of the proceeds of the collections of the taxes against which their warrants were issued, the decrees were not enforceable against the Board of Education, and denied to the petitioners the only remedy available to them.

Counsel for these petitioners and others similarly situated, in the briefs in this group of cases, (certified here for this Court's inspection,) and particularly in the briefs and the petition for rehearing in the *Leviton* case, which was decided at a term of the Court preceding the term at

which the case of these petitioners was decided, pressed upon the Supreme Court of Illinois their contentions that their property was being taken without due process of law and that they were being denied the equal protection of the law, in violation of the provisions of Section 1 of Amendment XIV of the Constitution of the United States, and cited in support of these contentions decisions of this Court, of the Supreme Court of Illinois, and of the courts of last resort of other American jurisdictions, but these contentions and the authorities cited were wholly disregarded by the Supreme Court of Illinois, and, upon an assumption of facts contrary to the record and upon theories not advanced by counsel for any of the parties, the Court entered a judgment which has taken from these petitioners' property which belongs to them and no one else and has given it to the Board of Education of the City of Chicago and others and has denied them compensation in any form.

## ARGUMENT.

These petitioners submit that the obvious result of the decision and judgment of the Supreme Court of Illinois is to deprive them of their property without due process of law and to deny them the equal protection of the law as guaranteed to them by Amendment XIV to the Constitution of the United States, when it is considered that that Court has refused to pass upon the validity and conclusiveness of petitioners' decrees against the Board of Education in the accounting suits, and has usurped judicial authority by going behind the decrees, and has destroyed the value of these decrees by refusing to petitioners their only remedy for enforcing them, and has denied to these petitioners the rights vested in them by their decrees, and has relieved the Board of Education of the obligations fixed against it by the decrees.

The mere fact that there is notice and opportunity to be heard is not due process of law, if the necessary result of the judgment entered is to deprive petitioner of his property without compensation or is otherwise inconsistent with the Fourteenth Amendment. (*Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 524, 528; *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 235.) Regard must be had to substance and not just to form to assure due process. (*Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 678; *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 234.) It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect federal constitutional rights cannot be declined when it is plain that the fair result of a decision of a State court is to deny such rights. *Rogers* v. *Alabama*, 192 U. S. 226, 230.

**A decree is property and a denial of the only remedy for the enforcement of the decree deprives the holder of his property without due process of law.**

Petitioners' decrees were duly entered by courts of competent jurisdiction in adversary proceedings where the Board of Education availed itself of the opportunity to present all of its defenses, and the indebtedness of the Board of Education was conclusively established by said decrees. This indebtedness is absolute. There can be no further inquiry into the validity of the claims on which the money decrees were entered. (*United States* v. *New Orleans*, 98 U. S. 381; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721; *Santa Fe County* v. *Coler*, 215 U. S. 296, 302; *Moore* v. *Town of Browning*, 373 Ill. 583, 585, 27 N. E. (2nd) 533, 535; *City of Cairo* v. *Campbell*, 116 Ill. 305, 308, 5 N. E. 114; *Town of Lyons* v. *Cooledge*, 89 Ill. 529, 534.) When there has been a final adjudication of private rights and these rights have passed into a decree, they become absolute and are immune to collateral attack. (*Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 431.) Such a decree is as much an article of property as anything else that a person owns and is as much protected by the Fourteenth Amendment as any other property. (*Collins* v. *Welsh*, 75 Fed. (2nd) 894, 897, (C. C. A. 9th); *Penn. Co.* v. *Scott*, 346 Pa. 13, 29 Atl. (2nd) 328, 329; *Casieri's Case*, 286 Mass. 50, 190 N. E. 118, 120; *Gilman* v. *Tucker*, 128 N. Y. 190, 28 N. E. 1040, 1043.) For the State, through any of its agencies, to abrogate all remedies for enforcing such a decree is to deprive the owner of his property without due process of law. (*Louisiana* v. *Pillsbury*, 105 U. S. 278, 301; *Hodges* v. *Snyder*, 261 U. S. 600, 603.) An essential part of every judgment passed by a court exercising judicial power is the right to enforce and give it effect. (*District of Columbia* v. *Eslin*, 183 U. S. 62, 65.) The remedy for enforcing a decree is just as much the life of the

decree as the remedy for enforcing a contract is the life of the contract.

**When the Supreme Court of Illinois relieved the Board of Education of its obligation fixed by petitioners' decrees, it took the property of petitioners and gave it to others and thereby deprived petitioners of their property without due process of law.**

It is the settled law of Illinois that a judgment or decree against a public corporation is a corporate obligation and that there is no escape from making provision for discharging the obligation. (*People* v. *Cairo*, 50 Ill. 154, 165; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 278, 183 N. E. 233, 235; *People* v. *Village of Bradley*, 367 Ill. 301, 305, 11 N. E. (2nd) 415, 418.) The discharge of its duty to pay such an obligation is not prohibited to such public corporation by Section 9 of Article IX of the Constitution of Illinois, (*Drainage Com'rs* v. *Rector Drainage Dist.*, 266 Ill. 536, 540, 107 N. E. 895, 897) and it would be no defense to a denial of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States if it did. *McCullough* v. *Virginia*, 172 U. S. 102, 123; *C. B. & Q. R. Co.*, v. *Chicago*, 166 U. S. 226, 239; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 431.

When the Supreme Court of Illinois refused to grant to these petitioners their only remedy to enforce their decrees against the Board of Education, it relieved the Board of liability to account for the property of these petitioners which it received to their use, as conclusively established by the decrees. The proceeds of collections of the anticipated, assigned and pledged taxes, when received into the treasury of the Board of Education was the property of these petitioners which the Board had, by its contract with the tax anticipation warrant holders, pledged itself to set apart and hold for the payment of

their warrants. When the Supreme Court of Illinois went behind the decrees entered in the accounting suits, which conclusively fixed the indebtedness of the Board of Education, and held that the decrees should not have been entered and that they were unenforceable, it took the property of these petitioners and gave it to the Board of Education. It is difficult to conceive of a more clear example of depriving one of property without due process of law. *Thompson* v. *Consolidated Gas Utilities Co.*, 300 U. S. 55, 78-80; *C. St. P. M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162, 167; *Ochoa* v. *Hernandez*, 230 U. S. 139, 161; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417.

The clear result of the decision of the Supreme Court of Illinois is the taking of the property of these petitioners and giving it to the other warrant holders who received more than their share of the proceeds of collections, which is exactly what the Fourteenth Amendment to the Constitution of the United States is designed to prevent. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417; *Ochoa* v. *Hernandez*, 230 U. S. 139, 161; *Panhandle Co.* v. *State Highways Com.*, 294 U. S. 613, 618.

**When the Supreme Court of Illinois went behind the decrees of these petitioners, which had conclusively established the liability of the Board of Education to account to them, and in effect excused the Board from its liability to restore to petitioners the property of petitioners which it had taken into its control and disbursed to others, the Supreme Court of Illinois deprived petitioners of their property without due process of law.**

Whether the Board of Education was under any duty to see that the proceeds of collection of anticipated, assigned and pledged taxes were distributed to the warrant holders as their interest appeared, the fact is that the

Board of Education took control of the private property of these warrant holders, disbursed it to others and interfered with their receiving what belonged to them. The prohibition of the Fourteenth Amendment of the seizure of or interference with private property by the State or any of its agencies applies as well where the seizure or interference is the result of a misuse or abuse of power as where it is the result of the regular exercise of power. (*Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 287; *Raymond* v. *Traction Co.,* 207 U. S. 20, 35.) The Board of Education, in taking control of and disposing of the private property of these petitioners, was exercising a power expressly granted by the School Act which required that "All moneys raised by taxation for school purposes, * * * shall be held by the city treasurer, *ex officio,* as school treasurer, * * * subject to the order of the board of education," and that "The city treasurer shall, as school treasurer, secure and safely keep all such moneys, subject to the control and direction of said board of education." (Sec. 135, App. p. 30.) Whatever right the Board of Education may have had to free itself from the task of seeing that the warrant holders became possessed of the proceeds of tax collections which had been assigned and pledged to them by the Board, the fact is that the Board, in the exercise of powers granted it by statute took control of and possessed itself of the private property of these petitioners and without their authority appropriated it and disbursed it to others.

Under a substantially identical situation this Court in *Ward* v. *Love County,* 253 U. S. 17, 24, held that the public corporation received tax moneys for the use and benefit of the claimants and that it could not lessen its liability to account by showing that it had paid over to others a portion of the moneys which belonged to claimants. In *C. B. & Q. R. Co.*

v. *Chicago*, 166 U. S. 226, 239, this Court, in holding that the Fourteenth Amendment protects the property of citizens from any interference or appropriation by the State or any of its agencies quoted with express approval the following from *Scott* v. *Toledo*, 36 Fed. 385, 395: "* * * any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. * * *, no matter under what form of procedure it is taken, [it] would violate the provisions of the federal constitution."

This constitutional right to compensation was an issue before the Circuit Court in the accounting suit and was conclusively settled in favor of petitioners by the decree of the Circuit Court, as were all other rights within the issues in that suit.

The Supreme Court of Illinois, by its judgment denying to these petitioners their only remedy for the enforcement of their decrees, has placed its judicial sanction on the action of the Board of Education in appropriating the private property of these petitioners without compensating them in any manner. The private rights of these petitioners in their property protected by the Fourteenth Amendment became absolute when the decrees entered in the accounting suits became final. Under the established law nothing that contradicted the record of these decrees could be set up as a defense in this mandamus proceeding. (*Harshman* v. *Knox County*, 122 U. S. 306, 318;

*Nugent* v. *Toman*, 372 Ill. 170, 175, 23 N. E. (2nd) 43, 45; *Drainage Dist.* v. *Highway Com'rs.* 238 Ill. 521, 524, 87 N. E. 394, 395.) The right of these petitioners to process to enforce their private rights was vested and absolute. (*McCullough* v. *Virginia*, 172 U. S. 102, 123; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721.) When the rights of these petitioners were denied to them by the judgment of the Supreme Court of Illinois they were deprived of their property without due process of law in violation of Section 1 of Amendment XIV to the Constitution of the United States.

**When the right to review the decrees of these petitioners no longer existed, it was a usurpation of judicial authority to go behind the decrees and retry the issues settled by the decrees.**

The Supreme Court of Illinois, while asserting its intention not to pass upon the question of whether the decrees entered in the accounting suits were valid and while asserting that it was not permitting a collateral attack upon the decrees, (R. 72) proceeded to go behind the decrees, which had become final and were no longer reviewable, and to examine at length into the claims upon which the decrees were entered. (R. 70-73.) Although it appeared from the face of the decrees that the claims upon which the decrees were entered had been finally adjudicated against the Board of Education by courts of competent jurisdiction, the Supreme Court found that the factual and legal basis of the decrees were the same as the substantially identical decree in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2d) 497, (App., p. 1), applied the decision in that case as binding in the case at bar, and held that for the reasons stated in the opinion in that case such claims were not valid claims against the Board and that the decrees should never have been

entered. (R. 72.) Thereupon, the Court held that the rights of petitioners as tax anticipation warrant holders were merged in the decrees upon their entry; (R. 73) and that therefore the Court would not permit the decrees to be enforced against the Board because to do so would in effect enforce against the Board claims which the Court would not have sustained had the decrees been directly appealed. (R. 75.)

The Court brushed aside a large number of cases relied upon by petitioners holding this to be a collateral attack, by the misstatement that in all of them power existed on the part of the municipality to create the debt or claim upon which the judgments involved were based. (R. 74.) Instead of applying the authorities in point, cited to it in the briefs of the parties, in deciding the case before it, the Court relied upon *Brownsville* v. *Loague*, 129 U. S. 493 and other similar cases, (R. 73) none of which had been cited in the brief of the Board of Education. In *Brownsville* v. *Loague*, judgment creditors relied for the remedy to enforce their final judgments, not upon the judgments themselves alone, as do petitioners in the case at bar, but upon a special taxing power or remedy granted by a statute pursuant to which were issued the securities upon which the judgments were entered. (R. 83-85.) This case is clearly distinguishable from the case at bar. It has never been applied to a fact situation like that now before the Court.

An attack upon a decree made in a proceeding other than that in which the decree was rendered, in order to be successful, must be grounded either upon a showing that the court assuming jurisdiction had no legal existence or power to act in the judgment proceeding or that in giving the particular decision it was acting outside the jurisdiction conferred upon it. (Freeman on Judgments, 5th Ed.

Vol. I, Sec. 373, p. 780.) Any assault other than one on the jurisdiction of the court entering the decree is a collateral attack when made in resistance to a mandamus proceeding brought to enforce the decree. (*Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Harshman* v. *Knox County*, 122 U. S. 306, 318; *People* v. *Village of Bradley*, 367 Ill. 301, 305, 11 N. E. (2nd) 415, 418; *Knaus* v. *Chicago Title & Trust Co.*, 365 Ill. 588, 591, 7 N. E. (2nd) 298, 300; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 277, 183 N. E. 233, 235.) It was a usurpation of judicial authority for the Supreme Court of Illinois to go behind the decrees entered in the accounting suits to determine whether they should have been entered. (*Voorhees* v. *Bank of United States*, 35 U. S. 449, 473; *Buckmaster* v. *Jackson*, 4 Ill. 104, 111.) In the *Voorhees* case this Court said (p. 473):

> "If the principle once prevails, that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court, after a writ of error or appeal is barred by limitation, every county court, or justice of the peace in the union, may exercise the same right, from which our own judgments or process would not be exempted. The only difference in this respect between this and any other court is, that no court can revise our proceedings; but that difference disappears, after the time prescribed for a writ of error or appeal to revise those of an inferior court of the United States or of any state: they stand on the same footing in law. The errors of the court do not impair their validity: binding till reversed, any objection to their full effect, must go to the authority under which they have been conducted."

When the Supreme Court of Illinois usurped judicial authority and destroyed the property of these petitioners in their decrees it denied the protection afforded by the Fourteenth Amendment.

**The Supreme Court of Illinois decided a case which was not presented by the records or by the briefs of the parties and refused to decide the questions necessary to a determination of the rights of these petitioners.**

The starting point for all the decisions in this group of cases is *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2nd) 497. (App. 1.) In that case the only issue before the Court was whether the complaint of the taxpayer of the school district, seeking an injunction to restrain the Board of Education from issuing judgment funding bonds, stated a cause of action. Contrary to the allegations of the complaint and to the findings of the decree, (R. 8, 47 in *Lewis* v. *Board*) the Supreme Court stated in its opinion, "The judgments thus rendered either had the twenty-nine warrants as a basis of liability or the breach of duty by an officer of a quasi municipal corporation as a basis of liability, neither of which could create one under the constitution." (App. p. 7-8.) Neither statement was true, as is clear from an examination of the pleadings and the decrees entered in the accounting suits, (R. 30-35, 37-41, 133-176 in *Hutchinson* v. *Board*) and of the complaint in the *Leviton* suit, (R. 8, 47 in *Lewis* v. *Board*) but the whole series of cases, including this mandamus proceeding, has been decided on this false premise.

It was never contended by the petitioners in the accounting suits that the officers of the Board owed them any duty or committed any breach of duty, nor did petitioners ever contend that the Board was liable on the warrants according to their terms. The petitioners base their claims solely on the agreement of the Board, expressed and implied, to account for the moneys received by the Board to their use, and at no time asked that the Board account to them for moneys which did not already belong to them and which were received into the

Board's treasury and held under its control. Notwithstanding this misstatement of the character of the accounting suits was pointed out to the Supreme Court in great detail in the brief of the holder of the decree there involved, filed in the second appeal (Lewis Brief, certified to this Court, pp. 80, 86, 89, 92, 93, 96, 98) the Supreme Court of Illinois, in its second opinion in the *Leriton* case persisted in the misstatement of the character of the accounting suits. (App. p. 18.) The same false construction of the complaints in the accounting suits is carried into the opinion in the instant case. (R. 72-73.)

This Court is not bound by the false premise assumed by the Supreme Court of Illinois. It will determine for itself the nature of the action in which petitioners' decrees were entered, the issues presented and decided in these proceedings, and the conclusiveness of the decrees entered. (*Truax* v. *Corrigan*, 257 U. S. 312, 324; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508; *Rogers* v. *Alabama*, 192 U. S. 226, 230; *Scott* v. *McNeal*, 154 U. S. 34, 45.

When it is determined, as we submit it must be, that the Supreme Court of Illinois has set up a straw man and knocked it down and has failed or refused to decide the lawsuit presented for decision, it will appear that the result of its decision is a denial to these petitioners of their day in court and as a consequence a denial to them of the protection of the Fourteenth Amendment.

**The Supreme Court of Illinois refused to decide whether petitioners' decrees were valid and whether the indebtedness decreed was absolute and so denied to these petitioners a determination of a question essential to the establishment of rights claimed by them under the Constitution of the United States.**

Whether these petitioners are entitled to the writ of mandamus to compel the corporate authorities of the Board

of Education to make provision for the payment of their money decrees cannot be determined without determining whether they hold valid decrees against the Board of Education. If the decrees held by these petitioners are valid, then they are corporate obligations and there is no escape under the law from granting these petitioners the relief they seek. *United States* v. *New Orleans*, 98 U. S. 381, 395; *People* v. *L. & N. R. R. Co.*, 350 Ill. 274, 278, 183 N. E. 233, 235; *Drainage Commrs.* v. *Rector Dr. Dist.*, 266 Ill. 536, 540, 107 N. E. 895, 897; *City of Cairo* v. *Campbell*, 116 Ill. 305, 308, 5 N. E. 114, 115.

A valuable property right in a decree is the right to have it enforced. This right to the enforcement of the decree is an integral part of every valid decree and to deny the only remedy available for its enforcement is to deprive the holder of his property without due process of law. (*Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 682; *Dist. of Columbia* v. *Eslin*, 183 U. S. 62, 65; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 301; *Wolff* v. *New Orleans*, 103 U. S. 358, 368.) It is just as much a denial of due process of law to refuse to decide a federal constitutional question presented as to decide it erroneously. (*Chapman* v. *Goodnow's Adm'r*, 123 U. S. 540, 548.) The Fourteenth Amendment assures to the citizen the privilege of having his federal constitutional rights and immunities judicially declared and protected when properly invoked and this Court has the province to inquire whether the decision of the State court rests upon a fair and substantial basis or one merely illusory and plainly untenable. (*Lawrence* v. *State Tax Com.*, 286 U. S. 276, 282; *Ward* v. *Love County*, 253 U. S. 17, 22.) We think it clear that the holding of the Supreme Court of Illinois (R. 72) that it is not necessary to determine the validity of the decrees of these petitioners in order to determine their property rights in their decrees, is pure sophistry.

**The Supreme Court of Illinois has arbitrarily refused to these petitioners the advantage of and redress afforded by the principles of law and presumptions and the remedies which it has heretofore afforded to all litigants in like circumstances and having claims substantially identical with those of these petitioners, and so has denied them the equal protection of the law.**

The Fourteenth Amendment requires that all persons shall have like access to the courts of the country for the protection of their property, the redress of their wrongs and the enforcement of their rights. (*Barbier* v. *Connolly*, 113 U. S. 27, 31; *Truax* v. *Corrigan*, 257 U. S. 312, 334; *Pierre* v. *Louisiana*, 306 U. S. 354, 358.) Prior to its decisions in this group of cases, the Supreme Court of Illinois, in line with the established law in all American jurisdictions, had held that a final decree duly entered by a court of competent jurisdiction was conclusive of every question within the issues (*People* v. *Village of Bradley*, 367 Ill. 301, 305; *Knaus* v. *Chicago Title & Trust Co.*, 365 Ill. 588, 592; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 277; *Marabia* v. *Thompson Hospital*, 309 Ill. 147, 157; *Miller* v. *Rowan*, 251 Ill. 344, 348; *Ward* v. *Field Museum*, 241 Ill. 496, 509; *Healy* v. *Deering*, 231 Ill. 423, 431; *Carney* v. *Village of Marseilles*, 136 Ill. 401, 407; *Harmon* v. *Auditor*, 123 Ill. 122, 133; *Iverson* v. *Loberg*, 26 Ill. 180, 182; *Swiggart* v. *Harber*, 5 Ill. 364, 371); that such a decree could not be collaterally questioned except on jurisdictional grounds (*People* v. *Lewe*, 380 Ill. 531, 535; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 278; *Sheahan* v. *Madigan*, 275 Ill. 372, 377; *O'Connor* v. *Board of Trustees*, 247 Ill. 54, 59); that such a decree could not be modified, vacated or reversed after the statutory period within which such action might be taken had expired (*Anderson* v. *Anderson*, 380 Ill. 435, 438; *Knaus* v. *Chicago Title & Trust Co.*, 365 Ill. 588, 592; *Tosetti* v. *Kohler*, 200 Ill. 369, 372; *Lilly* v. *Shaw*, 59 Ill. 72, 77; *Cook* v. *Wood*, 24 Ill. 295, 298; *Buck-*

*master* v. *Jackson*, 4 Ill. 104, 107, 111; *Morgan* v. *Hays*, 1 Ill. 126, 127); and that such a decree entered against a public corporation is conclusive of the liability of such corporation and is a corporate obligation, the payment of which the courts will enforce by the writ of mandamus. (*Elmhurst Bk.* v. *Vil. of Bellwood*, 372 Ill. 204, 205; *People* v. *Village of Bradley*, 367 Ill. 301, 305; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 277; *Drainage Com'rs.* v. *Rector Drainage Dist.*, 266 Ill. 536, 540; *Carney* v. *Village of Marseilles*, 136 Ill. 401, 407; *Town of Lyons* v. *Cooledge*, 89 Ill. 529, 534; *People* v. *City of Cairo*, 50 Ill. 154, 165.) In this case and the companion cases, the Supreme Court of Illinois denied to these litigants the remedies afforded to other litigants in like circumstances and having claims substantially identical with those of these petitioners, and deprived them of their vested property rights in their decrees, and as a consequence denied them the equal protection of the law.

An early case in Illinois which holds that neither a quasi-municipal corporation nor any other public body against whom a judgment has been rendered can, in a mandamus proceeding to compel it to provide for the payment of that judgment, go behind it and question the sufficiency of the cause of action upon which it is predicated, is *Town of Lyons* v. *Cooledge*, 89 Ill. 529. In that case the Town sought to defend against the petition for the writ of mandamus on the ground that the claim upon which the judgment was obtained in the Superior Court of Cook County was unjust and fraudulent in character; that it was the result of collusion between the claimant and the supervisor of the town; that the highway commissioners had no authority to make the contract out of which the claim arose; and that an injunction had been entered prior to the obtaining of the judgment which enjoined the collection of a town tax to pay the claim upon which the judgment was based. A writ of mandamus was ordered

by the Circuit Court of Cook County and the Supreme Court of Illinois affirmed the judgment holding (p. 534) that the judgment was not void however erroneous it may have been and that while it was probable that the judgment would have been reversed on appeal, still it was not a nullity subject to collateral attack.

A case which appears to us to be decisive of the rights of these petitioners to the relief as prayed is *Moore* v. *Town of Browning*, 373 Ill. 583, 27 N. E. (2nd) 533. In this case Moore recovered a judgment against the Town of Browning, a quasi-municipal corporation, and the judgment not having been paid, he filed his petition for a writ of mandamus against the Town to require it to levy a tax to pay the judgment. The Town in its answer to the petition attempted to raise the question of the sufficiency of the complaint on which the judgment was obtained, on the ground that the claim alleged therein was not a corporate obligation. The answer was stricken on motion and the writ awarded. In affirming the judgment awarding the writ, the Supreme Court of Illinois said (p. 585-586):

> "Appellant here attacks the original declaration in assumpsit against it on which this judgment was rendered, declaring that that declaration did not state a cause of action and that the due process clause of the constitution was violated by the entry of the judgment, and that this being so, *mandamus* should not be granted. Appellant's attack on the sufficiency of the declaration in the original assumpsit suit against it, is collateral. It is conceded on this record that the court had jurisdiction of the parties, and, of course, it must be conceded that it had jurisdiction of the class of cases to which the suit belongs. Jurisdiction is the power to hear and determine the subject matter in the controversy between the parties to the suit. Whether a declaration in a case of which the court has jurisdiction states a cause of action has no important bearing on the question of jurisdiction

of the court of the class of the case. The declaration stated a case of the general class over which the authority of the court extended, and the court had jurisdiction.

* * * * *

"The court, in the original lawsuit, having had jurisdiction of the parties and the subject matter, its judgment cannot be questioned in a collateral proceeding.

"When the judgment was rendered against the appellant township it was the duty of its board of auditors to audit the judgment, allow it as a claim against the township and levy a tax to pay the amount due."

The cases of these petitioners cannot be distinguished from these cases and other cases cited in this argument. The Supreme Court of Illinois did not undertake to distinguish them. It ignored them, notwithstanding these petitioners pressed them upon the attention of the Court in their printed briefs and in oral argument. It is evident that the Court did not intend to overrule these cases. If these petitioners had proved their titles to their respective claims allowed in the accounting suits by any other muniments than the contracts with the Board of Education (called tax anticipation warrants for want of a better name) the Supreme Court would have held, in line with the established law, that the decrees were conclusive of all questions within the issues in the accounting suits and that these decrees were corporate obligations of the Board and that the Board could not escape making provision for their payment. Because petitioners prove their title to their property by a muniment labeled "tax anticipation warrant" the Supreme Court of Illinois erects an unheard-of rule that the decrees obtained in their accounting suits, even though valid and subsisting, are unenforceable against the Board, and denies these

petitioners the only remedy available to them. There would be just as much reason in a pronouncement that decrees held by white men will be enforced, but decrees held by negroes are unenforceable. This capricious and arbitrary action of the Supreme Court of Illinois is not mere error decision or mere failure to follow its own precedents, but it is an application of a special rule of decision to these litigants and results in a denial of the equal protection of the law. *Truax* v. *Corrigan,* 257 U. S. 312, 334; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369, 374; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 559; *Pierre* v. *Louisiana,* 306 U. S. 354, 358.

**The sustaining of the defense of the Board of Education of its present inability to levy taxes to pay petitioners' decrees as an additional ground of its decision, after the Supreme Court of Illinois had held that the decrees were not corporate obligations of the Board of Education and could not be enforced against it, without regard to the financial condition of the Board, was not an independent ground of decision of sufficient breadth to sustain the judgment of that Court without a decision of the federal constitutional questions.**

The Board of Education, by its answer, challenged the validity of the decrees obtained against it by petitioners in their accounting suits and asked that they be held void under the authority of *Leviton* v. *Board of Education,* 374 Ill. 594, 30 N. E. (2d) 497. (R. 41, 43, 48-50.) As an alternative defense the Board averred that the taxes which it was permitted to levy under existing statutes were barely sufficient to maintain the public schools and that it did not have the present ability to levy additional taxes necessary to pay petitioners' decrees. (R. 52-56.) The Board of Education admitted the existence of the Act of July 12, 1937, which authorized it to issue bonds to pay

judgment indebtedness, but averred that the Supreme Court of Illinois, by its decision in *Leviton* v. *Board of Education,* 374 Ill. 594, had held that it could not issue bonds to pay the decrees entered in the accounting suits. (R. 50-51.) The effect of the answer of the Board is that it has the means to provide for the payment of petitioners' decrees, if it may issue bonds pursuant to the authority granted by the Act of July 12, 1937, but that it does not have the ability to provide funds for the payment of these decrees unless it can exercise the authority granted to it by said Act. The real issue between petitioners and the Board of Education in the mandamus proceeding was the validity of the decrees, the petitioners contending that they were valid subsisting corporate obligations of the Board of Education, and the Board contending that they were void.

The Supreme Court of Illinois specifically declined to determine the validity of the decrees, saying: "The judgment decree shows upon its face that it never should have been entered, because of the reasons set out in *Leviton* v. *Board of Education,* 374 Ill. 594, but it is not now necessary to determine the validity of such judgment in disposing of the real issue of whether the board of education can be compelled by mandamus to levy a new tax to pay judgments showing upon their face that to compel such act will require the board to violate the constitution." (R. 72.) The Court said further: "The nature and character of the plaintiff's claim being fully disclosed upon the face of the judgment, and indicating facts which would require the officers to violate the constitution in order to levy a tax for its payment, *mandamus* may properly be refused, not because we invalidate the judgment, but because we cannot require public officers to violate the provisions of the constitution. The alternative prayer that the board be required to do all things necessary to issue

bonds under the Judgment Refunding Act of 1937 requires no comment, because of our holding that it is unconstitutional. *Leviton* v. *Board of Education*, No. 27496." (R. 75.)

After the Supreme Court of Illinois had refused to determine the validity of petitioners' decrees, an issue squarely presented and a question vital to the rights of petitioners as the holders of the decrees, but had held that the Board of Education could not, by the levying of taxes or by the issuing of bonds, provide the means for the payment of the decrees, thereby destroying the value of the decrees and depriving these petitioners of their property rights in the decrees (R. 72-75), it added as a mere make-weight that another ground for denying the only remedy available to petitioners was the present inability of the Board to provide for the payment of the judgments by a levy of taxes in addition to the levy required for educational purposes. (R. 75.)

It is for the State courts to determine the adjective as well as the substantive law of the State, but they must, in so doing, accord the parties the rights guaranteed to them by the Fourteenth Amendment. (*Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 682.) Although this Court will in all cases accord respectful consideration and great weight to the views of the State's highest court, still, in order that the rights, privileges, and immunities guaranteed to citizens by the Constitution of the United States may not become a dead letter, this Court is not bound to accept the decisions of the State court, even on matters primarily of State law, where there is raised and presented to said Court the question of whether the decision of or the course of proceedings in the State court has in fact or effect denied or impaired or violated the constitutional rights of the parties. (*Indiana* v. *Brand*, 303 U. S. 95, 100; *Coombes* v. *Getz*, 285 U. S. 434, 441; *Rogers* v. *Alabama*, 192 U. S.

226, 230.) In such case this Court will decide for itself, independent of the State court, all questions involved in the case, including questions of State law (*Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508) irrespective of the character of those questions as factual, (*Truax* v. *Corrigan*, 257 U. S. 312, 324) procedural, (*N. Y. C. R. R. Co.* v. *N. Y. & Pa. Co.*, 271 U. S. 124, 126; *Davis* v. *Wechsler*, 263 U. S. 22, 24-25) or substantive, (*Coombes* v. *Getz*, 285 U. S. 434, 441; *Scott* v. *McNeal*, 154 U. S. 34, 45) and irrespective of the disposition that may be made of the federal questions, or whether it be found necessary to decide them at all. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508.

While this rule has been applied most frequently in cases involving questions of impairment of obligation of contract, it extends over, applies to and embraces all manner of cases involving impairment or denial by the State of the rights, privileges and immunities guaranteed citizens by the Fourteenth Amendment. (*Rogers* v. *Alabama*, 192 U. S. 226, 230; *Scott* v. *McNeal*, 154 U. S. 34, 45.) In speaking of this subject as early as *Gelpcke* v. *City of Dubuque*, 68 U. S. 175, 206, this Court pointed out that "* * * there has been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."

Where the State court undertakes to decide the case on non-federal grounds and the non-federal ground of decision is unsubstantial, unfounded or illusory, this Court has jurisdiction. (*Enterprise Irrigation Dist.* v. *Canal Co.*, 243 U. S. 157, 164; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540.) Also where the non-federal question is so interwoven with federal questions as not to be independent, or where it is not of sufficient breadth to sustain the judgment of the State court without a deci-

sion of the federal questions, the jurisdiction of this Court is clear. (*State Tax Com.* v. *Van Cott*, 306 U. S. 511, 514; *Anderson* v. *Carkins*, 135 U. S. 483, 486.) Non-federal grounds of decision, plainly untenable, may not be successfully put forward by a State court in the face of claim in that court of substantial federal constitutional rights, so as to deprive this Court of jurisdiction to review the judgment of the State court and to insure to all litigants the rights and protection afforded them by the Constitution of the United States. *Ward* v. *Love County*, 253 U. S. 17, 22; *Terre Haute, etc. R. Co.* v. *Indiana*, 194 U. S. 579, 589.

There are conditions under which a court, in the exercise of its discretion, may deny the peremptory writ of mandamus, but a court has no legal right to deny the writ where the effect of the denial is to deprive a person of his property without due process of law, in violation of Section 1 of Amendment XIV of the Constitution of the United States. The holder of a decree entered against a public corporation by a court of competent jurisdiction which has become final is entitled to a writ of mandamus to compel the corporate authorities to take the necessary steps to provide for the payment of the decree as a matter of right, and no court has a legal right to refuse the writ. (*Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721; *United States* v. *New Orleans*, 98 U. S. 381, 397; *Moore* v. *Town of Browning*, 373 Ill. 583, 588, 27 N. E. 2d 533, 536; *Drainage Com'rs.* v. *Rector Drainage Dist.*, 266 Ill. 536, 540, 107 N. E. 895, 897; *People* v. *City of Cairo*, 50 Ill. 154, 165.) While it is true that a court may in a collateral proceeding control the enforcement of a judgment, it is well settled that the control exercised must not be such as violates the Fourteenth Amendment. *Com'rs. of Sinking Fund* v. *Philadelphia*, 324 Pa. 129, 188 Atl. 314, 316-318.

It was within the jurisdiction of the Supreme Court of Illinois to fix such terms in the granting of the writ of

mandamus as would enable the Board of Education to meet its obligations to these judgment creditors without interfering with its obligation to maintain the public schools (*People* v. *Webb*, 256 Ill. 364, 379, 100 N. E. 224, 229; *People* v. *City of Cairo*, 50 Ill. 154, 168; *State* v. *County of Bay*, 112 Fla. 687, 151 So. 10, 23; *Com'rs. of Sinking Fund* v. *Philadelphia*, 324 Pa. 129, 188 Atl. 314, 318), but when the Court refused to award any writ whatsoever to petitioners in this case it deprived them of the only remedy they had for enforcing their decrees against the Board of Education and destroyed the value of their decrees, and as a consequence deprived them of their property in their decrees without due process of law in violation of the Fourteenth Amendment. (*Louisiana* v. *Pilsbury*, 105 U. S. 278, 301; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721; *Com'rs. of Sinking Fund* v. *Philadelphia*, 324 Pa. 129, 188 Atl. 314, 317; *State* v. *County of Bay*, 112 Fla. 687, 151 So. 10, 23.) The denial of the writ in this case is not a mere temporary withholding of the remedy of these petitioners but is a permanent denial to them of their only remedy to enforce the payment of their decrees. Unless the decision of the Supreme Court of Illinois is reversed the decrees of these petitioners are mere scraps of paper.

It is therefore clear that the sustaining of the alternative defense of the Board of Education that it does not have the present ability to provide by the levy of taxes for the payment of these decrees is not an independent ground of decision which is broad enough to sustain the judgment of the Supreme Court of Illinois, without a decision of the federal questions.

The opinion of the Supreme Court of Illinois does not disclose that it considered the federal questions presented. Rights under the Constitution of the United States are denied as well by refusal or failure of the State court to decide the federal questions presented as by an erroneous decision of them. (*Chapman* v. *Goodnow's Admr.*, 123 U. S. 540, 548.)

The Fourteenth Amendment insures to the citizen the privilege of having his constitutional rights and immunities judicially declared and protected when properly invoked, and this Court has the province to inquire whether the decision of the State court rests on a fair and substantial non-federal ground or on one merely illusory. (*Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.) In considering whether citizens have been deprived of their constitutional rights, this Court will be guided by realities and not by mere labels, and, in so doing, will look to the fair result of the decision and action of a State court as bearing on such constitutional rights. *Rogers* v. *Alabama*, 192 U. S. 226, 230.

Respectfully submitted,

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I have authorized the filing of the foregoing supporting brief on behalf of Reconstruction Finance Corporation.

CHARLES FAHY,
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# APPENDIX.

## OPINION OF SUPREME COURT OF ILLINOIS.

Opinion filed June 14, 1940; rehearing denied Dec. 10, 1940.

Reported, 374 Ill. 594, 30 N. E. (2nd) 497.

*Frank C. Leviton, Appellant,* v. *Board of Education of the City of Chicago, et al., Appellees.*

Mr. Justice Gunn delivered the opinion of the court:

Appellant, Frank C. Leviton, on behalf of himself and other taxpayers, brought suit against the board of education and certain officials of the city of Chicago, in the circuit court of Cook county, seeking an injunction restraining them from issuing, certifying or selling any bonds for the purpose of satisfying certain judgments against the board of education of the city of Chicago, as purported to be authorized by the act of July 12, 1937. (Laws of 1937, p. 1083.) A motion to dismiss was sustained and the petition dismissed for want of equity.

Appellant, among other things, contends that the act in question violates the constitution of the State of Illinois, which contention gives this court jurisdiction on direct appeal. In the year 1929, school tax levies as extended in the city of Chicago for all school purposes amounted to slightly in excess of $66,000,000, after deducting a reserve for loss and cost of collection. Tax anticipation warrants were issued against this fund in excess of $63,000,000. The total amount of the levy was considerably larger, but, by the time the rate was extended by the county clerk, the valuation of the real estate in the school district had been re-

duced by a new assessment of real estate so that the amount anticipated exceeded seventy-five per cent of the tax which could be collected.

The legislature enacted a law in 1933 authorizing the issuance of $10,000,000 in bonds for the purpose of raising funds to pay the unpaid warrants of the 1929 levy, but this law was held unconstitutional in *Berman* v. *Board of Education*, 360 Ill. 535. At the time of filing this suit, warrants to the amount of about $53,000,000 had been paid, leaving unpaid tax warrants aggregating more than $10,000,000 and there were no funds to pay them. In 1936, the United States District Court rendered a judgment against the board of education of the city of Chicago for the principal sum of $1,090,591.37, in favor of the holder of 1929 school anticipation warrants. This judgment was affirmed by the United States Circuit Court of Appeals. (*Board of Education* v. *Norfolk and Western Railway Co.* 88 Fed. (2) 462.) Prior to the filing of the complaint in this case, numerous suits were brought by holders of such anticipation warrants, and judgments obtained against the board of education in the circuit and superior courts of Cook county, from which no appeal was taken. In 1937, the legislature enacted a law which authorized any school district having a population exceeding 500,000 inhabitants to issue bonds to pay judgment indebtedness based upon the order or decree of any court of record, but provided such bonds should not be issued to pay any judgments rendered for money due upon unpaid claims for services, supplies or materials. The bonds could be issued when authorized by an ordinance adopted by the city council, and could bear interest at the rate of not to exceed five per cent. payable within twenty years and callable at par, plus accrued interest.

On September 15, 1939, steps were taken for the issuance and sale of $80,000 of such bonds purporting to be issued under authority of this statute, to discharge a judgment

obtained in the circuit court of Cook county by F. J. Lewis, in the principal sum of $73,371. The record discloses judgments have been obtained against the board of education in excess of $2,000,000, all based upon the non-payment of the 1929 anticipation warrants, and that it is the intention of the board of education to discharge said judgments by money derived from the sale of the bonds authorized under the act of 1937.

Appellant makes the following contentions: First, that the plaintiff, and those in behalf of whom he sues, are not bound by the decrees and judgments of the several courts above mentioned because tax warrants constituting the basis of liability do not constitute valid obligations of the board; second, the judgments in the circuit and superior courts are constructively fraudulent and not binding on the taxpayers; third, that the act of July 12, 1937, violates section 22 of article 4 of the constitution as being special legislation, and also section 9 of article 9, which prohibits the board of education for levying taxes which will be used for purposes other than corporate purposes.

The school warrants were all issued before the passage of the act of 1935, requiring the warrants to be numbered consecutively and paid in the order of their issuance, beginning with the one having the lowest number. The United States Circuit Court of Appeals held, in substance, that the holders of warrants were entitled to be paid *pro rata* out of the taxes collected, and that the board of education was obligated, as a trustee, to see that each holder of warrants received his share of the funds collected, and directed that the taxes collected from the 1929 levy be distributed, from time to time, and an accounting was ordered to determine the amount due plaintiff in that case. This decision is based on a breach of trust on the part of the board of education in not prorating the 1929 taxes collected, to the holders of warrants, proportionately.

As we read this decision, no accounting is required from anything except the 1929 school taxes, as collected. The ultimate relief depends on the accounting. In so deciding the Circuit Court of appeals relied on the cases holding a city is under obligation to account when it collects assessments for local improvement bonds. In the case of these bonds the holders are entitled to the entire assessment collected and the city merely acts as a collector to distribute all the money *pro rata* on the bonds, to discharge a debt owed. (*Rothschild* v. *Village of Calumet Park*, 350 Ill. 330.) A tax anticipation warrant is simply an assignment of tax money which directs the treasurer to pay the holder. In the alternative, it can be presented to the tax collector in full discharge of taxes. We have repeatedly held no debt is created by an anticipation warrant, (*Berman* v. *Board of Education*, *supra*,) and after delivery there is no future obligation upon it, either absolute or contingent, to pay out of anything except the levy anticipated, when collected. *Diamond* v. *Comr. of Highways*, 366 Ill. 503.

In *City of Springfield* v. *Edwards*, 84 Ill. 626, speaking with reference to the application of taxes to the payment of anticipation warrants, this court said: "The duty remains for the proper officers to collect and pay over the tax in accordance with the appropriation—but obviously for any failure in that regard the remedy must be against the officers and not against the corporation, for otherwise a contingent debt would in this way be incurred by the corporation." This principle is followed in *Booth* v. *Opel*, 244 Ill. 317.

A school district is a *quasi* municipal corporation. (*Roumbos* v. *City of Chicago*, 332 Ill. 70; *Melin* v. *School District*, 312 id. 376; *Kinnare* v. *City of Chicago*, 171 id. 332.) Such *quasi* municipal corporations are not liable for a breach of duty by its officers. (*Elmore* v. *Drainage Comrs.* 135 Ill. 269; *Kinnare* v. *City of Chicago*, 171 id.

332; *Bradbury* v. *Vandalia Drainage District*, 236 id. 36; *Roumbos* v. *City of Chicago, supra.*) In the *Elmore case,* with respect to the liability of a *quasi* corporation, this court said: "So, also, it is admitted law that municipal corporations proper, such as villages, towns and cities which are incorporated by special charters or voluntarily organized under general laws, are liable to individuals injured by their negligent or tortious conduct, or that of their agents and servants, in respect to corporate duties. In regard to public involuntary *quasi* corporations the rule is otherwise, and there is no such implied liability imposed upon them. These latter,—such as counties, townships, school districts, road districts and other similar *quasi* corporations,—exist under general laws of the State, which apportion its territory into local subdivisions, for the purpose of civil and governmental administration, and impose upon the people residing in said several subdivisions, precise and limited public duties, and clothe them with restricted corporation functions, co-extensive with the duties developed upon them. In such organizations the duties, and their correlative powers, are assumed in invitum, and there is no responsibility to respond in damages, in a civil action, for neglect in the performance of duties, *unless such action is given by statute.* (Citations.) * * * The non-liability of the public *quasi* corporation, unless liability is expressly declared, is usually placed upon these grounds: That the corporators are made such *nolens volens,* that their powers are limited and specific, and that no corporate funds are provided which can, without express provision of law, be appropriated to private indemnification. Consequently, in such case, the liability is one of imperfect obligation, and no civil action lies at the suit of an individual for non-performance of the duty imposed."

The cases of *People* v. *Village of Bradley,* 367 Ill. 301, *Rothchild* v. *Village of Calumet Park, supra,* and *Conway*

v. *City of Chicago*, 237 Ill. 128, all involve a city or village which are voluntary corporations and not *quasi* municipal corporations, which fact distinguishes such cases from those above cited dealing with *quasi* municipal corporations.

The judgments of the circuit and superior court are based upon the same grounds as those of the United States Circuit Court of Appeals and no appeal was taken from these judgments.

Appellant says these judgments are void because predicated upon the 1929 warrants. Appellees reply that the board appeared and made defense, and hence all taxpayers are bound by the judgment. Fraud and collusion are not directly charged in the complaint but the fact that judgments were obtained and no appeal taken, together with knowledge of the board officials of the decision in the *Berman case*, is urged as constituting constructive fraud. The situation is anomalous. In the *Berman case* the taxpayer was the plaintiff and the board of education was the defendant. The matter litigated was the right of the board to issue bonds to pay anticipation warrants. The taxpayer urged that the board could not issue and sell such bonds because it was contrary to section 9 of article 9 of the constitution, and this court upheld this contention. The decision held that funds derived from other sources by legislative act, to be used to pay these 1929 warrants, were prohibited by the constitution. The proposed use of the money thus obtained was the controlling factor of the case.

In the case before us, holders of these 1929 warrants obtained judgments against the board of education, which are said to bind the taxpayer so he cannot enjoin the issuance of bonds to pay a claim now reduced to judgment, which we previously held was illegal as violative of section 9 of article 9 of the constitution. It is true that the

public and taxpayers are, in most instances, bound by a judgment against the municipality because they are presumed to have like interests. (*People* v. *Ford*, 289 Ill. 550; *Harmon* v. *Auditor of Public Accounts*, 123 id. 122.) The presumed interest of the taxpayer and the board of education does not actually exist in this case. In the *Berman case* the attitude of the board was adverse to the taxpayers, as it claimed the tax body should be burdened with bonds to pay anticipation warrants and the taxpayers claimed the opposite. In the case at bar, while, presumptively, the board, in filing answers to the suits in the circuit and superior courts, was acting for the public, in reality it was acting adversely, because it is now contending for the same result it prayed in the *Berman case*, namely, to pay the 1929 anticipation warrants, now merged or converted into the form of judgments, with the proceeds of bonds, the principal and interest of which will be paid from new taxes. The record shows a situation akin to *res judicata* in favor of the taxpayer and against the board, because the issue decided in the *Berman case* was illegal authorization of the payment of 1929 tax warrants with money from sources other than the 1929 school tax. The *Berman case* was binding on all questions within the issue. (*Harmon* v. *Auditor of Public Accounts*, *supra*), but the position now taken by the appellees would accomplish the same result in a different manner.

Numerous judgments were obtained, at about the same time, against the board. The board knew a fund created to pay the 1929 school warrants had been held invalid. The interests of the taxpayers and the board of education in respect to raising money for this particular purpose were actually adverse, and the judgments were allowed upon a theory of liability never approved by this court. The judgments thus rendered either had the twenty-nine warrants as a basis of liability or the breach of duty by an officer of a

quasi municipal corporation as a basis of liability, neither of which could create one under the constitution. A judgment so rendered is presumptively void.

In *People* v. *Illinois Central Railroad Co.*, 298 Ill. 516, we quoted with approval from *Lindsay* v. *Allen*, 112 Tenn. 637, where it is said:

> "While it is proper and just that even the rights of the public of and concerning any special matter should be concluded by one fair litigation in which the matters involved were faithfully presented and considered, it should be emphasized that the litigation must be bona fide, fair and honest from beginning to end."

While this was said with respect to a taxpayer binding the municipality, we think it has equal application to a case where the municipality undertakes under present circumstances to bind the taxpayer. The situation renders *People* v. *Ford* and other like cases inapplicable

It is not necessary to decide what effect this situation has on such judgments other than to hold the taxpayers are not barred from contesting the validity of the act of 1937 authorizing bonds to be used as a means of paying them.

The complaint alleges that the act of 1937, authorizing the issuance of bonds to pay these judgments, is void. The motion to strike and dismiss admits the allegations of the complaint. Under the Civil Practice act exhibits are a part of the complaint. The judgment entered in the circuit court, set out in the complaint by way of exhibit, discloses the plaintiff in the Lewis case, for the discharge of whose judgment the $80,000 in bonds are to be issued, owned $35,000 of warrants against the educational fund and $30,000 of warrants against the building fund of the 1929 taxes. The sale of these bonds will furnish money to pay his judgment in full. When these bonds are issued a direct annual tax will be levied to pay principal and interest. If the bonds run for the full period, $4,000 a year for twenty years will

be collected. This tax will be collected to pay interest, and is paid out of money not coming from the 1929 taxes. We assume that all the judgments obtained, and probably all like liability upon the unpaid warrants of 1929, will be discharged in this way. Interest in the sum of $500,000 a year for twenty years is authorized. It is plain that the result of the transaction will be that the board of education will pay out millions of dollars in excess of the amount that could be collected by the holders of the tax warrants from the tax fund itself. In *Berman* v. *Board of Education, supra*, we distinctly held that the holders of tax anticipation warrants must look to the specific tax assigned for the payment of the warrants. In the Berman case the board of education was authorized to issue $10,000,000 for the purpose of paying tax warrants. It was held that this act was void because it violated section 9 of article 9 of the constitution as it authorized the payment of a tax warrant which was not a corporate purpose because a tax warrant does not create a debt. We can not close our eyes to the fact that the only distinction between this case and the Berman case lies in the fact that a judgment has been obtained upon the assumption that the tax warrant creates an obligation which resulted in a debt, and the bonds are issued to discharge the judgment, which will effectuate the very object this court declared to be illegal in the Berman case. In *Green* v. *Hutsonville School District*, 356 Ill. 216, where judgment was obtained for an obligation in excess of the constitutional limit, and years afterwards bonds to an amount within the debt limit were voted to pay this judgment, this court said:

> "We have held that it makes no difference under what guise or by what sort of trick the attempt is made, an indebtedness in excess of the constitutional limit cannot be voluntarily created."

This language is appropriate to the present situation.

In *Dimond* v. *Comr. of Highways, supra,* a suit was brought on an anticipation warrant issued by the commissioner of highways. There was no money collected out of which to pay it, but the legislature had enacted a statute which provided that anticipation warrants of such character could be paid from any available revenue derived from taxes or otherwise. In holding this validating act void the court, in confirming the holding in the Berman case, said: "When the warrant is issued and accepted or sold, the transaction is closed on the part of the municipality, leaving no future obligation upon it either absolute or contingent, whereby its debt may be increased. The holder of such warrant must look to the specific fund set apart for its payment. We pointed out that, under section 9 of article 9 of the constitution, all taxation by municipal corporations must be for corporate purposes, and that bonds purporting to be a general obligation of the municipality and issued in payment of anticipation warrants are not for a corporate purpose and are therefore invalid. It follows that a judgment on such a warrant, the payment of which could be effected from general funds, falls within the same category."

The complaint charges directly that the judgment for which bonds are to be issued is to discharge anticipation warrants. The bonds are a general obligation to be paid from a direct annual tax. The complaint discloses tax warrants have been reduced to judgment and a device is thereby created whereby apparently a judgment, instead of an anticipation warrant, is being paid from other revenues.

We have held the statutory limitation of the amount that may be raised by taxation cannot be avoided by permitting obligations to take the form of judgments. To do so would open the door to an evasion of the statutory limitation of taxation. (*People* v. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co.*, 300 Ill. 368; *Chicago and Alton Railroad Co.* v. *People*, 177 id. 91.) This principle applies

when taxes are levied to be used for a purpose contrary to the provisions of the constitution.

To the extent that the act of July 12, 1937, authorizes bonds to be issued and sold to discharge judgments, based on liability arising out of unpaid tax anticipation warrants, it is void because of the prohibition contained in section 9 of article 9 of the constitution. This makes it unnecessary to pass on the other points raised in the briefs.

The decree of the circuit court is reversed and the cause is remanded, with directions to overrule the motion to dismiss the complaint.

Reversed and remanded, with directions.

Mr. Justice Shaw, dissenting.

OPINION OF SUPREME COURT OF ILLINOIS.

Opinion filed Jan. 20, 1944; rehearing denied Mar. 22, 1944.

Reported, 385 Ill. 599, 53 N. E. (2nd) 596.

*Frank C. Leviton, Appellee* v. *Board of Education of the City of Chicago, et al., Separate Appellants.*

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*F. J. Lewis, Appellant.*

Mr. Justice Murphy delivered the opinion of the court:

This appeal is a sequel to *Leviton* v. *Board of Education*, 374 Ill. 594. The former appeal was from an order of the circuit court of Cook County allowing a motion to dismiss plaintiff's complaint for want of equity. The order was reversed and the cause remanded with directions to overrule the motion. This appeal is from a decree entered after a hearing of evidence. It enjoins the board of education of the city of Chicago, the president and secretary of the board, the mayor and comptroller of the city from issuing, certifying or selling bonds of the board of education, which bonds were to be issued to obtain funds to satisfy a judgment held by F. J. Lewis against said board of education.

The gist of the complaint, filed by a taxpayer, was that the board was about to exercise a power purported to be conferred by an act of the General Assembly passed in 1937 (Ill. Rev. Stat. 1943, chap. 122, par. 327.62 *et seq.*) which enactment, it was alleged, was unconstitutional when the power conferred therein was to be exercised for the purpose of providing funds to pay judgments such as the one held by F. J. Lewis. On the contentions made on the former appeal we held the act violated the State constitution. Lewis was

not a party to the action until after the cause was remanded, when he was granted leave to intervene. The defendants on the original appeal and Lewis filed separate answers. The allegations of the complaint remained the same as when the cause was remanded. Evidence was introduced and a decree entered as indicated. Lewis appealed to this court urging constitutional questions. The board of education has taken a separate appeal. The board's appeal is in the form of an alternative in that it asks that the decree appealed from be reversed unless it is adjudged that Lewis's judgment is void, in which event, it asks this court to affirm the decree. Lewis does not seek a reversal of the former holding of this court that the statute under which the bonds were to be issued was unconstitutional, but endeavors to bypass the effect of that holding by having it determined that his judgment is final and conclusive of every question litigated in the case in which the judgment was taken and that the same questions cannot be relitigated in this proceeding.

Such contention calls for a brief statement of the facts as admitted by the pleadings and established by the evidence. In December, 1928, and the early part of 1929, the board of education of the city of Chicago levied taxes for the year 1929. They were levied for educational, building and playground purposes. Soon after the levies were adopted, the board of education, pursuant to authorization from the city counsel, issued tax anticipation warrants against each of the three funds. The amount issued against any one fund did not exceed 75 per cent of the levy for that fund and in that regard was within the requirements of section 132 of the School Law. (Ill. Rev. Stat. 1943, chap. 122, par. 155.) Had it not been for events thereafter occurring, the tax levied would have been ample, if collected, to have discharged the anticipation warrants in full. However, the State Tax Commission ordered a reassessment of

all property in the city of Chicago. Such reassessment prevented the county clerk from extending the taxes for the year 1929 until 1931, thereby increasing the amount of interest accruing on the warrants. For causes not material here, the amount of taxes extended was greatly reduced from that provided in the levies. The decrease in the amount of tax extended and the increase in the interest liability presented the situation which gives rise to the litigation in this case and many others of a like character.

After the taxes were collected on the 1929 levy, the board of education applied 75 per cent of the amount collected to the payment of the warrants. After practically all of the available tax money had been so applied, there were unpaid warrants totalling about ten million dollars. Lewis held unpaid warrants against the educational and building funds, but since the principle that controls these warrants is applicable to warrants against both funds, no distinction will be made between them.

The General Assembly adopted an act which became effective July 10, 1933, (Laws of 1933-34, 1st, 2nd and 3rd Special Sessions, page 241,) which undertook to authorize municipalities in the class to which the board of education of the city of Chicago belonged, to issue bonds for the purposes of paying unpaid tax warrants. The validity of this statute was attacked in a taxpayers' suit and on appeal it was held that the statute violated section 9 of article IX, and section 2 of article II of the State constitution. (*Berman* v. *Board of Education*, 360 Ill. 535.) The judgment in this case became final at the June term, 1935, when a petition for rehearing was denied.

In July, 1935, the Norfolk & Western Railway Company started an action against the board of education questioning the method the board had followed in applying the taxes collected on the 1929 levy to the payment of the antici-

pation warrants. The warrants as issued were identified by letter as to the fund against which they were drawn and were numbered beginning with 1 and progressing to the next higher number as each warrant was issued. The numbering appears to have been a matter of convenience and bookkeeping, for the statute, as it then existed, did not require that school anticipation warrants should be numbered, and there was no provision fixing order of payment. The statute has been amended in that regard since that time. The warrants were paid in the order of issue. In the action of the Norfolk & Western Railway Company, a judgment was obtained against the board of education of the city of Chicago in the Federal district court for more than a million dollars. Recovery was allowed on the theory that all anticipation warrants issued against any particular fund were of the same priority in payment and that taxes collected and distributed to the fund should be paid pro rata on all warrants issued against the fund. The decree entered directed that the board of education should apply the money on hand on a prorata basis in part payment of the unpaid warrants, and that tax money subsequently collected should be likewise prorated. An accounting was ordered to determine the amount the plaintiff in that case would have received had the tax money collected prior to the commencement of the suit and used in payments of other warrants in full been prorated to all warrants drawn against the fund. After the amount was determined, judgment was entered against the board for the same. This decree was affirmed in the United States Circuit Court of Appeals. *Norfolk & Western Railway Co.* v. *Board of Education*, 88 Fed. (2d) 462.

Thereafter, other parties holding warrants issued against the 1929 tax levy started suits, some in State courts and others in the Federal court, but all sought recovery upon the same theory as was approved by the Circuit Court of

Appeals in the *Norfolk & Western case.* Some of those cases have proceeded to final judgment while others are pending either on appeal or in the trial courts. Appellant F. J. Lewis obtained a judgment against the board of education for more than $70,000; his right of recovery was founded upon the theory adopted by the Federal Court in the *Norfolk & Western case.*

The act of July 12, 1937, is entitled, "An Act to authorize the board of education of any school district constituted by law in any city having a population exceeding 500,000 inhabitants, to issue bonds to pay judgment indebtedness." Section 1 provides that any school district constituted by law in any city having a population exceeding 500,000 inhabitants is authorized to issue bonds to pay judgment indebtedness based upon an order or decree of any court of record theretofore or thereafter entered. It contains a proviso that bonds shall not be issued to pay any judgments rendered for money due upon unpaid claims for services rendered, for supplies or for material. It regulates the rate of interest the bonds shall bear, their sales at par and that they shall mature within 20 years from their date. Section 6 declares that, before or at the time of issuing the bonds, an ordinance shall be adopted providing for the levy and collection of a direct annual tax upon all the taxable property of the district sufficient in amount to pay the principal and interest. Such tax is to be in addition to, and exclusive of, the maximum of all other taxes which such board of education or such city council is already authorized by law to levy.

In *Berman* v. *Board of Education,* 360 Ill. 535, the act of 1933 which authorized the issuance of bonds to pay anticipation warrants issued against the 1929 levy was considered and held unconstitutional. After a review of the authorities, we said: "From these and numerous other authorities it seems clear that tax anticipation warrants are not debts

and do not represent direct legal obligations of the municipality issuing them. It follows that an appropriation and levy for their payment must fail, since not for a corporate purpose. Where the money is not due as a result of any promise, contract or debt of the municipality, little justification can be found for an appropriation to pay private holders of tax anticipation warrants the moneys which they have failed to collect from the sources to which such collections are exclusively confined. An appropriation for such a purpose certainly could not be deemed an appropriation for a corporate purpose."

In *Dimond* v. *Commissioner of Highway*, 366 Ill. 503, where legislation authorizing the payment of anticipation warrants out of available revenue was under consideration, it was said: "Each of the acts of 1931 and 1933, in providing for the payment of anticipation warrants out of any available revenue derived from taxes or otherwise, other than the fund anticipated, violates section 9 of article IX and the due process clause, of the constitution."

Bonds issued by the defendant board of education to pay outstanding tax anticipation warrants for the years 1928 and 1929 were considered on an objection to a tax levy in *People ex rel. Toman* v. *Granada Apartment Hotel Corp.*, 381 Ill. 41. It was said: "It is settled that legislation authorizing the issuance of bonds for the purpose of liquidating tax anticipation warrants is unconstitutional. * * * The present attempt to accomplish by indirection what obviously can not be done directly represents another effort to obtain liquidation of tax anticipation warrants in contravention of the law."

On the former appeal of this case it was said: "To the extent that the act of July 12, 1937, authorizes bonds to be issued and sold to discharge judgments based on liability arising out of unpaid tax anticipation warrants, it is void

because of the prohibition contained in section 9 of article 9 of the constitution."

From these holdings it must be taken as the established law of this State that a statute which undertakes to authorize the payment of tax anticipation warrants out of revenue other than the levy against which they are drawn transcends constitutional provisions.

Lewis advances various contentions by which he seeks to avoid the application of the foregoing principle to his judgment. He calls attention to the fact that in obtaining his judgments he did not declare upon the warrants but limited his right to recovery to an amount he should have received from the tax money collected on the 1929 levy had it been paid pro rata on all warrants issued against the fund. The difference in the character of the actions does not in itself obviate the application of the rule, for if plaintiff's theory of recovery was but a plan of procedure designed to impose a liability upon the school district to pay a tax anticipation warrant, then the judgment could not be paid from the bond fund, for it would be the using of money, later to be replaced by tax levy, for other than a corporate purpose. The constitutional requirement that it can not be levied for other than corporate purposes can not be circumvented by a mere matter of form. On the former appeal, (374 Ill. 594,) it was pointed out that judgments such as Lewis had must be founded either upon a liability upon the warrants or a liability for the breach of duty by the officers of a quasi-municipal corporation, neither of which could be enforced against the board of education.

Lewis' main contention is that the instant proceeding constitutes a collateral attack upon his judgment and that any inquiry into the facts to determine the basis of the judgment is a relitigation of the issues in the former case.

It can hardly be said that without the inquiry as to the basis of plaintiff's judgment we would not be advised on such matters, for the pleadings and admissions contained therein disclose that Lewis' judgment was to recover that part of the 1929 taxes which he contends he failed to receive by reason of mispayment on other warrants. In plaintiff's suit, based upon his right as a taxpayer, he questions the authority of the board of education to issue and sell the bonds in question. He contends that the issuance of the bonds to provide funds to pay the judgment and the levying of taxes to pay the bonds when they mature, is burdening the district with a liability which it is not obligated by law to pay and would be for other than a corporate purpose. It will be observed that plaintiff's attack is not upon the judgment or any writs issued on it to enforce its collection but upon the right and authority of the board to apply the money derived from a sale of the bonds to the payment of the judgment. When it has been determined, as it was on the former appeal, that an exercise of the power conferred by the statute would constitute the imposition of a liability upon the school district for other than corporate purposes, that would be the extent of plaintiff's recovery and the issuance of the bonds would be enjoined. That would not be a relitigation of any of the issues that were tried in the former case.

It will be observed that the statute in question does not authorize the issuance of bonds for the payment of all judgments but the proviso expressly excludes judgments obtained for services, material or supplies. Conceding, without deciding, that such a classification of judgments would be valid, it would be obvious that, in a suit by a taxpayer to enjoin the application of the proceeds of a bond issue to the payment of a particular judgment, one of the chief issues might be to determine whether the judgment was of the character covered by the statute or whether

it was for items excluded by the proviso. If the record of a judgment be given the conclusiveness contended for by appellant, then inquiry into the purpose for which the judgment liability arises would be closed in such a suit.

However, the decree which awards Lewis a money judgment contains a finding that Lewis was entitled to a judgment against the corporate body "for the respective pro rata amounts of the proceeds of the aforesaid tax levies which the plaintiff should have received, based upon the ratio which the warrants held by plaintiff bear to the total amount of warrants issued, * * *." The record of the judgment discloses the character of Lewis' claim.

The principal distinction between the facts shown by the record on this appeal and the former appeal pertains to two matters. The board of education introduced evidence to show the nature and character of the defenses it interposed in the suit that was prosecuted to the Circuit Court of Appeals and in the cases where Lewis and others obtained judgments against the defendants. This was evidently introduced for the purpose of showing that the board of education used all reasonable diligence and skill in preventing the plaintiffs in those cases from obtaining judgments and that it would not subject Lewis' judgment to an attack on the grounds of fraud, actual or constructive. It is sufficient to say that it is clearly shown that the defenses interposed were made in good faith and that the judgments were not collusively obtained. The views expressed are not drawn from any implications that the litigation was not vigorously defended or that the defenses were not interposed in good faith. The other point of difference is that on the hearing defendants introduced evidence to show the custom and practice followed by this defendant and other municipal corporations in the payment of tax anticipation warrants. The evidence shows that

prior to the decision in the *Norfolk & Western case* in the Federal courts, the custom universally followed was to pay the warrants in the order of their issue. The propriety of that issue can not be inquired into in this case. That was a matter determined in the other proceedings and can not be relitigated in this action.

Appellant Lewis urges other points but in view of our holding on the former appeal and reaffirmed here, that the statute in question is unconstitutional as applied to Lewis' judgment, it is not necessary to consider them.

Appellant Lewis contends that to bar him the right of recovery on his judgment is to violate his rights under the due-process clause of the State and Federal constitutions. He purchased the anticipation warrants charged with the knowledge that they did not create a liability against the school district issuing them. They were in legal effect assignments of sufficient amounts of tax money to pay the principal and interest. After delivery there was no liability upon the municipality issuing them, either absolute or contingent, to pay if the taxes levied proved to be insufficient. It is not a denial of due process to hold that the loss that arises out of such warrants cannot be imposed upon the municipality issuing them.

In its separate appeal, the appellant board of education asks that Lewis' judgment be declared void in this proceeding. The views expressed as to the limited purpose and scope of the inquiry into Lewis' judgment excludes consideration as to whether such judgment is void.

The decree of the circuit court of Cook county was correct and is affirmed.

DECREE AFFIRMED.

OPINION OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

*Norfolk & W. Ry. Co.* v. *Board of Education of the City of Chicago, et al.*, 14 Fed. Supp. 475 (1936):

WOODWARD, *District Judge.*

By this suit plaintiff seeks to enjoin the defendants, the board of education of the city of Chicago, the city of Chicago, and certain officers of the board of education and of the city from paying out any money now in the hands of the city treasurer of the city of Chicago arising from the proceeds of taxes extended for educational and building purposes upon the tax levy for 1929, except on a pro rata basis, to the owners and holders of tax anticipation warrants who have not been paid either principal or accrued interest on warrants issued against the educational and building tax levies, respectively, for 1929.

[Here appears a statement of facts similar to the statement appearing in the records here.]

The question arising upon this record may be stated as follows: Should the outstanding educational and building warrants be paid in the numerical order of their issuance until the respective funds are exhausted or shall the fund on hand, and hereafter to be collected, be prorated among the holders of all the outstanding warrants?

These warrants were issued under and pursuant to the terms and provisions of section 132 of the School Law as it read in 1929. Elsewhere in this opinion the text of the material portions of this statute is set out. Under this statute the only source from which moneys could be derived for the payment of the warrants was the proceeds of taxes levied and extended for educational and building pur-

poses for 1929. The statute expressly provides that they shall be paid out of taxes when collected and not otherwise. Under no circumstances do the warrants become the obligations either of the city of Chicago or of the board of education. This was expressly held by the Supreme Court of Illinois in the case of *Berman* v. *Board of Education*, 360 Ill. 535, 196 N. E. 464, 99 A. L. R. 1029, which involved the warrants now in controversy. Under the warrant statute (section 132 of the School Law as amended in 1929), it was the duty of the proper municipal authorities to levy the taxes, to extend the taxes against the real and personal property of the school district subject to taxation, to collect the taxes, and, when collected, to apply the proceeds of the collection to the payment of all warrants issued in anticipation of the taxes. The statute contains no provision for the numbering of the warrants, or that they shall be numbered in the order of their issuance, or that they be paid in numerical order, or in any manner that would result in a priority or preference of one warrant over another. Each of the warrants provided that "taxes are hereby assigned and pledged to the payment of this warrant and of all warrants issued against and in anticipation of such taxes."

All the taxes are assigned and pledged for all the warrants without distinction of any kind. All warrant holders have an equal title to the fund. The legislative intent was that all holders of warrants should participate in the distribution of the fund. The lien of all warrants against the fund was equal, and this equality attached when the warrants were issued. The warrants were to be paid out of a closed and limited fund which was "assigned and pledged" to pay all warrants issued against the fund. All the taxes levied, extended, and collected for educational and building purposes for the year 1929 constituted a trust fund for the benefit of all the warrant holders until all the warrants

issued against such funds were paid and retired. *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 183 N. E. 337; *Bankers Life Co.* v. *Elmwood Park*, 280 Ill. App. 524; *People* v. *City of Park Ridge*, 275 Ill. App. 97; *New Orleans* v. *Fisher*, 180 U. S. 185, 21 S. Ct. 347, 45 L. Ed. 485. The warrants were signed by both the city of Chicago and the board of education, and expressly constituted defendants trustees of the proceeds of the tax levies when received by the defendants.

The funds derived from the taxes were levied and collected for a particular purpose. The fund was created to discharge the obligation of the taxing units to the holders of tax anticipation warrants. When the municipality collected those funds and held them in the treasury for application to the payment of the warrants, such funds were impressed with a trust and the municipal corporation holding the funds and charged with their proper disbursement is a trustee. As heretofore noted, there is no primary obligation on the part of the city or the board of education to pay the tax anticipation warrants out of any general fund of the city or of the board of education. The municipal corporations, however, became trustees for the collection and disbursement of the taxes levied and extended to create a fund out of which the tax anticipation warrants might be paid. Authorities cited, *supra*.

This suit is brought to charge the defendants with their obligations as trustees and not to collect from the municipal defendants the face amount, with interest, of the tax anticipation warrants. As above noted, the warrants are to be paid out of a limited and closed fund. There is no inexhaustible power of taxation to replenish the fund. At the time the first warrants were paid, it was not reasonably to be anticipated that the collections from the extended taxes would be sufficient to pay and discharge all of the warrants issued against the educational and build-

ing tax levies. A reassessment had been ordered by the state tax commission. A large part of the taxes were to be produced from extensions against personal property. The country and the city, at that time, were in the midst of an unparalleled financial depression. A large percentage of the taxes extended against personal property, it was reasonable to conclude, never would be collected. In other words, as elsewhere stated, the fund was insolvent at the time the bill was filed and reasonably should have been anticipated to be insolvent at the time the first warrant was paid.

In such case the rule that equality is equity is applied and the fund will be distributed pro rata. Leading textwriters have expounded the rule very clearly.

* * * * *

The rule is also stated and the authorities are reviewed in the case of *Wells* v. *Village of Wilmette*, 193 Ill. App. 30.

Warrants and bonds, which are payable out of a special and limited fund, must share equally and ratably in that fund, since the fund is created for the payment of all the bonds without preference. *Rothschild* v. *Village of Calumet Park, supra; Wells* v. *Village of Wilmette, supra; People* v. *City of Park Ridge*, 275 Ill. App. 97; *Jewell* v. *Superior* (C. C. A.) 135 F. 19; *State* v. *Drainage District*, 334 Mo. 753, 68 S. W. (2d) 671. An exhaustive annotation of cases dealing with this question is found in connection with *State ex rel. Buckwalter* v. *Lakeland*, 112 Fla. 200, 150 So. 508, 90 A. L. R. 704-717.

In *Rothschild* v. *Village of Calumet Park, supra*, it was directly and expressly held that the holders of bonds issued against special assessments were entitled to receive their pro rata share of all of the money collected and received by the village, and that a showing by the plaintiff

that funds applicable to the bonds had been received by the village and that the plaintiff had not received his pro rata share thereof was sufficient to make out a prima facie case entitling plaintiff to recover his pro rata share of money collected. That case does not regard the question of insolvency as being material to the plaintiff's case, but holds that, immediately upon collection of the fund or any part thereof, the bondholders are all entitled to share equally and ratably in the money collected.

A like holding was made in *Wells* v. *Village of Wilmette*, *supra*, where a recovery was sustained by the bondholder against the village, the fund having been exhausted by payment in full of bonds in the order of their presentation.

*People ex rel. Decker* v. *City of Park Ridge*, *supra*, also holds likewise.

It appears that the law in Illinois is definitely settled to the effect that each warrant holder was entitled to payment upon his warrants pro rata out of all moneys collected and received by the defendants and no warrant holders were at any time entitled to more than a pro rata payment. All of the warrants in this case were past due, according to their maturity dates, before any taxes were collected and before any warrants were paid. Under the law of Illinois, all warrant holders, therefore, stood upon an equal basis as to all of the collections made by the defendants and all were entitled to a pro rata payment out of all of the funds at any time coming into the hands of the defendants from the educational and building levies for the year 1929.

In *Rothschild* v. *Village of Calumet Park*, *supra*, the suit was for an accounting of money collected upon special assessments for the payment of local improvement bonds issued and payable out of said special assessments. That case is similar in all respects to the instant case.

The court there say, 350 Ill. 330, at page 341, 183 N. E. 337, 341:

> "The suit is brought to enforce its liability, as trustee, to pay to the holders of the bonds the money which it received for that purpose, and it is the same, in effect, as an action of assumpsit for money had and received."

The court there further say, 350 Ill. 330, at page 342, 183 N. E. 337, 342:

> "Objection is also made to the decree because it is said that it does not appear that the city has paid the money it has collected to bondholders other than the defendant in error or that it has improperly paid to other bondholders more than their proportionate share. That is no answer to the claim of the defendant in error. His complaint is that the village collected the money for the payment of all the bondholders pro rata and that it did not pay him pro rata—not that it paid somebody else more than his share. It is argued that the burden of proof is on the complainant to show that the money had been improperly applied elsewhere. This is not so. When the defendant in error had shown that the village collected the money applicable to the payment of his bonds and had not paid them, he had met the burden imposed upon him and was entitled to judgment unless the plaintiff in error showed a valid defense."

To the same effect is *Conway* v. *City of Chicago*, 237 Ill. 128, 86 N. E. 619; *Wells* v. *Village of Wilmette*, *supra*, and *People ex rel.* v. *Park Ridge*, *supra*.

It appears from the above cases that it is not essential that the complainant show that the city of Chicago and board of education has misapplied the taxes collected. Whether defendants have paid other warrant holders more than their proper share is immaterial to plaintiff's case. The gist of the plaintiff's cause of action is that the defendants have received taxes from the 1929 levy against

which plaintiff's warrants were issued and the defendants have not paid the plaintiff its pro rata share of such taxes actually received by defendants. This makes out a complete case warranting recovery in favor of the plaintiff and the burden is upon the defendants to show, if they can, a defense to such case.

The court holds that the plaintiff is entitled to recover from the city of Chicago and the board of education its pro rata share of all moneys received by the defendants applicable to the payment of 1929 educational and building warrants as for money had and received to the use of plaintiff, and hence is entitled to an accounting.

* * * * *

The injunctive relief prayed for in plaintiff's bill will be granted and a decree may be entered for an accounting.

## Pertinent Provisions of Applicable Sections of Illinois School Act.

(Laws of 1917, pp. 724-732; Smith-Hurd Stat. 1929, Chap. 122, Pars. 151-162.)

§ 128. Each city having a population exceeding 100,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools, which shall be under the charge of a board of education, which shall be a body politic and corporate, by the name of "Board of Education of the City of .....," and by that name may sue and be sued in all courts and places where judicial proceedings are had. * * *

§ 129. The board of education shall elect annually, from its own number, a president and vice-president, in such manner and at such time as the board determines by its rules. * * * The board of education shall also elect a secretary, prescribe his duties, term of office and compensation. * * *

§ 131. The board of education shall, subject to the limitations contained in this act, establish by-laws, rules and regulations, which shall have the force of ordinances * * * for the entire management of the schools, * * *

§ 132. The board of education may acquire, by purchase, condemnation or otherwise, real estate for any and all school purposes. * * *

The board of education shall have power to erect or purchase buildings suitable for school houses, for school administration, and for deriving revenues from school lands, and keep the same in repair; and to issue bonds for the purpose of building, furnishing and repairing school houses and school administration buildings and for purchasing sites for the same, and to provide for the payment of said bonds; and when there is not sufficient money in the treasury to meet the ordinary and necessary expenses for educational and for building purposes, to request the city council, whose duty thereupon it shall be, to order issued warrants against and in anticipation of any taxes levied for the payment of the expenditures for educational and for building purposes to the extent of seventy-five per cent of the total amount of the taxes levied for such purposes: Provided, however, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, at the time fixed therein and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes against which said warrants are drawn shall be set apart and held for their payment. Every warrant issued against said taxes shall bear interest, payable annually out of the taxes against which said warrants are drawn, at a rate of not to exceed six per cent per annum, from the date of their issuance until paid, or until notice shall be given by publication in a newspaper or otherwise that the money for the payment of said warrants

is available and that said warrants will be paid on presentation. Provided, however, said rate shall be not to exceed five (5) percent after April 30, 1932. * * *

§ 135. The fiscal year of the board of education shall commence on January 1st unless otherwise determined by the rules of said board. * * *

All moneys raised by taxation for school purposes, or received from the State Common School Fund, or from any other source for school purposes, shall be held by the city treasurer, *ex-officio*, as school treasurer, in separate funds for school purposes, subject to the order of the board of education upon its warrants signed by its president and secretary and countersigned by the mayor and city comptroller.

The city treasurer shall, as school treasurer, secure and safely keep all such moneys, subject to the control and direction of said board of education, and shall, subject to the limitations contained in this act, keep his books and accounts concerning such moneys in such manner as may be prescribed by said board, and said books and accounts shall always be subject to the inspection of said board, or any member thereof. He shall at the end of each and every month, and oftener if required, render under oath an account to the board of education, showing the state of the school treasury at the date of such account and the balance of money in that treasury. He shall also accompany such accounts with a statement of all moneys received into the school treasury, and on what account, together with all warrants redeemed and paid by him; which said warrants, if any, and all vouchers held by him shall be delivered to the business manager of the board and filed with his account in the business manager's office upon every day of such settlement. He shall return all warrants paid by him, stamped or marked "Paid." He shall keep a register

of all warrants redeemed and paid, which shall describe such warrants and show the date, amount, number, the fund from which paid, the name of the person to whom and when paid. • • •

§ 135½. The board of education shall, within the first quarter of each fiscal year, beginning with the year 1930, adopt a budget and shall pass a resolution to be termed the "annual school budget," in and by which annual school budget the said board of education shall appropriate such sums of money as may be required to defray all necessary expenses and liabilities of said board to be paid or incurred during the fiscal year. • • •

§ 136. The board of education shall exercise general supervision and management of the public education and the public school system of the city. • • •

§ 139. The specifications of the powers herein granted are not to be construed as exclusive, but the board of education shall exercise all the powers that may be requisite or proper for the maintenance and the fullest development of an efficient public school system, not inconsistent with those general provisions of the school law of the state which apply to all school districts.

PERTINENT PROVISIONS OF ACT OF JULY 12, 1937.

(Laws of 1937, pp. 1083-1085; Ill. Stat. 1937, Chap. 122, Pars. 327.62-327.68.)

§ 1. Any school district constituted by law in any city having a population exceeding 500,000 inhabitants is authorized to issue bonds to pay judgment indebtedness based upon order or decree of any court of record heretofore or hereafter entered: Provided, bonds shall not be issued to pay any judgments rendered for money due upon unpaid

claims for services rendered, for supplies, or for materials. • • •

§ 2. Whenever the board of education desires to issue such bonds it shall adopt a resolution designating the judgments to be paid and fixing the amount of bonds proposed to be issued, the maturity thereof, the rate of interest thereon, and the amount of taxes to be levied annually for the purpose of paying the principal of and interest upon such bonds and all details of the bond issue. • • •

(41)

SEP 9 19

IN THE

# Supreme Court of the United States

October Term, A. D. 1944

## No. 330

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. RECONSTRUCTION FINANCE CORPORATION, etc., and 210 other Relators,

*Plaintiffs-Petitioners,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, Sr., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, and B. L. MAJEWSKI, as Members, and JAMES B. McCAHEY, as Member and President,

*Defendants-Respondents.*

## STATEMENT BY RESPONDENTS OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

RICHARD S. FOLSOM,
FRANK S. RIGHEIMER,
*Attorneys for Respondents.*

*Of Counsel:*
FRANK R. SCHNEBERGER,
JAMES W. COFFEY.

BARNARD & MILLER, 137 Printers, FRAnklin 0561, CHICAGO

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IN THE

# Supreme Court of the United States

October Term, A. D. 1944

## No. 330

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. RECONSTRUCTION FINANCE CORPORATION, etc., and 210 other Relators,

*Plaintiffs-Petitioners,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, Sr., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, and B. L. MAJEWSKI, as Members, and JAMES B. McCAHEY, as Member and President,

*Defendants-Respondents.*

## STATEMENT BY RESPONDENTS OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

Respondents, Board of Education of the City of Chicago, Nels H. Olson, F. P. Siebel, Sr., Mrs. L. Robert Mellin, Mrs. W. F. Heineman, Wilson Frankland, Samuel Levin, Joseph W. Cremin, Walter Truc

and B. L. Majewski, as Members, and James B. McCahey, as Member and President, respectfully present to the court the following matters and grounds making against the jurisdiction of the Supreme Court of the United States of the petition of the People of the State of Illinois on the Relation of Reconstruction Finance Corporation, a corporation of the United States of America, created by Act of Congress, and 210 other judgment creditors of the Board of Education of the City of Chicago, for a writ of certiorari directing the Supreme Court of Illinois to certify to this court the record in the case of the *People of the State of Illinois ex rel. Reconstruction Finance Corporation, et al.* v. *Board of Education of the City of Chicago, et al.*

## STATEMENT OF THE CASE

The proceeding with reference to which certiorari is sought was a mandamus suit brought on the relation of the Reconstruction Finance Corporation and other relators designated in the petition for certiorari only as "210 other relators" seeking a writ to compel the Board of Education and its members and President to do all things necessary to pay certain judgments held by them by (1) including in the Board's annual budget for the year 1943 an appropriation of sufficient funds, money and revenues of the Board for said year to pay these judgments, so they may become a part of the appropriation for the payment of which a levy of taxes may be made by the City Council of the City of Chicago (R. 38), and (2) in the alternative command respondents to do all things devolved upon them by law under the Act of July 12, 1937 (Illinois Session Laws of 1937, pp. 1083-1085; Ill. Rev. Stat. 1937, Ch. 122, Pars. 327.62-327.68) to bring about the issuance of bonds of the Board in sufficient amount to provide the funds to pay their judgments plus interest, and bring about the levy of taxes upon all taxable property in Chicago sufficient to pay the bonds at maturity and pay interest when due and out of the proceeds of the sale of bonds to pay petitioners' judgments with interest. (R. 39)

In view of the fact that petitioners in their statement of the case have gone behind the judgments they are seeking to enforce in an effort to show that they are entitled to the relief which they seek, and to give the court the background of the litigation and the facts

upon which the judgments were based and in so doing have omitted some of the facts, we find it necessary to make a complete statement for a correct understanding of the situation.

The Board of Education of the City of Chicago is a special type body politic and corporate, namely a quasi municipal corporation,* created by an act of the General Assembly of the State of Illinois for the sole purpose of maintaining a thorough and efficient system of schools in the City of Chicago. (Illinois Session Laws, 1917, pp. 724-732; Smith-Hurd Ill. Rev. Stats. 1929, Chap. 122, Pars. 151-162, 186; §128-139, 161, of the School Law) This is in accordance with the mandate of the State Constitution which requires that the General Assembly shall provide a thorough and efficient system of free schools whereby all children of the State may receive a good common school education. (Sec. 1, Art. 8, Constitution of the State of Illinois) It has always been the law in Illinois that such quasi municipal corporation is not liable in tort.**

The funds with which to maintain and operate the schools of Chicago under the charge and control of the Board of Education are secured from taxation authorized by the legislature under definite limitations imposed by the State Constitution.***

The Board, like most school districts throughout the state and nation, usually collects the taxes in the year

* See cases hereafter cited, p. 17.

** See cases hereafter cited, p. 17

*** Section 9, Article 9, Constitution of Illinois, provides: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same."

following that in which expenditures are made. Therefore it is necessary for it to sell tax anticipation warrants to secure funds to operate the schools. The terms and conditions under which such tax anticipation warrants could be issued in 1929 are set forth in Sec. 132 of the then School Act. (Smith-Hurd Ill. Rev. Stats. 1929, Ch. 122, Par. 155, §132) Specifically the Act provides, among other things, that "warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes against which said warrants are drawn shall be set apart and held for their payment." It was the law when the 1929 warrants were issued and for many years prior thereto that when the warrants are issued they are a closed transaction and are no obligation of the Board.*

Early in 1929 the City Council of the City of Chicago, on the request and demand of the Board, levied taxes for school purposes for the year 1929. (R. 3, *Lewis* v. *Board*) Soon after the levies were adopted the Board of Education, pursuant to authorization from the City Council, issued 1929 tax anticipation warrants against educational, building and playground purposes funds. (R. 5, *Lewis* v. *Board*) The amount issued against any one fund did not exceed 75% of the levy for that fund and in that regard was within the requirements of Sec. 132 of the School Law. (R. 4, 8, 69, *Lewis* v. *Board*) Had it not been for the events thereafter occurring the tax levied would have been ample, if collected, to have discharged the anticipation warrants

* See cases hereafter cited, p. 16.

in full. However, the State Tax Commission ordered a reassessment of all property in the City of Chicago whereby the assessed value was reduced. Such reassessment prevented the County Clerk from extending the taxes for the year 1929 until 1931, thereby increasing the amount of interest accruing on the warrants and the amount of taxes extended was greatly reduced from that provided in the levies. (R. 68, *Lewis* v. *Board*) The decrease in the amount of tax extended and the increase in the interest liability presented the situation which gave rise to the present litigation.

The 1929 warrants were numbered from 1 upwards. (R. 5, *Lewis* v. *Board*) As fast as the 1929 taxes were collected, 1929 warrants were called and paid in full in the order of the number appearing on the face of such warrants, beginning with the lowest number (except those warrants received in the payment of taxes), out of 1929 taxes. (R. 166, 175, 180, *Lewis* v. *Board*) This was in accordance with the general custom and practice of the Board and its officers followed in each year since the 1917 Act, which first authorized said Board to issue tax anticipation warrants, (R. 167-168, *Lewis* v. *Board*) and in accordance with the general practice of the other taxing districts universally followed throughout the State. (R. 168, 171, 173, *Lewis* v. *Board*; *Leviton* v. *Board* opinion R. 244)

In the meantime, because it became apparent that 1929 taxes would not be collected in an amount sufficient to pay approximately $10,000,000 of higher numbered 1929 warrants, the General Assembly adopted an act which became effective on July 10, 1933 (Illinois Session Laws of 1933-34, First, Second and Third Special Sessions, p. 241) which authorized public

corporations of the class of the Board of Education of the City of Chicago to issue bonds for the purpose of paying unpaid tax anticipation warrants. The validity of this statute was attacked in a taxpayers' suit and on appeal it was held that the statute violated Section 9 of Article 9 and Section 2 of Article 2 of the Illinois State Constitution because "* * * tax anticipation warrants are not debts and do not represent direct legal obligations of the municipality issuing them. It follows that an appropriation and levy for their payment must fail, since not for a corporate purpose. Where the money is not due as a result of any promise, contract or debt of the municipality, little justification can be found for an appropriation to pay private holders of tax anticipation warrants the moneys which they have failed to collect from the sources to which such collections are exclusively confined. An appropriation for such a purpose certainly could not be deemed an appropriation for a corporate purpose." (*Berman* v. *Board of Education*, 360 Ill. 535, 542)

July 17, 1935, after the payment in numerical order in full of $39,696,000 of the $46,800,000 of 1929 educational warrants issued and $12,998,000 of the $15,900,000 of 1929 building warrants issued, together with interest on said warrants at the rate of 6% per annum from date of issuance, the first litigation was brought contesting the method used in applying the 1929 taxes to payment of 1929 anticipation warrants. (*Norfolk & Western Ry. Co.* v. *Board of Education, et al.*, 14 Fed. Sup. 475, 88 Fed. (2d) 462) Thereafter other parties holding warrants issued against the 1929 tax levy started suits, some in the State courts and others in the federal court, and after the decree was entered in

the *Norfolk* case, judgments were entered in the other cases on the same theory as that in the *Norfolk* case. The judgments of petitioners here are attached as exhibits to the petition for mandamus in the case at bar. (R. 23-36,*People ex rel. R. F. C.* v. *Board*)

The judgments in each of the cases are practically identical to the one in the case of Reconstruction Finance Corporation. In the Reconstruction Finance Corporation judgment, the court finds that it has jurisdiction of the subject matter and the parties and that the plaintiff is entitled to recover from the Board of Education of the City of Chicago "its pro rata share of all money at any time received and disbursed prior to the commencement of this suit by the defendant, Board of Education of the City of Chicago, as the proceeds of the taxes collected on the tax levies of the Board of Education of the City of Chicago for educational purposes and for building purposes for the year 1929 against which the tax anticipation warrants legally held by this plaintiff were issued." (R. 23)

The court found that large amounts of money had been received by the Board as the proceeds of the taxes collected on account of the levies of 1929 and "that said moneys had been distributed by the Board contrary to law and *in breach of trust*" (emphasis added, R. 23) and that the money so distributed should have been distributed pro rata among all the owners and holders of the then outstanding warrants. It then proceeds to find from the evidence that the plaintiff is entitled to "have judgment * * * for the respective pro rata amounts of the proceeds of the aforesaid tax levies which plaintiff should have received, based upon the ratio which the warrants held by the plaintiff bear

to the total amount of warrants issued, less the warrants surrendered to the County Clerk for the payment of taxes from time to time, together with interest at the rate of five per cent per annum upon said pro rata amounts" (R. 24) excluding interest already paid on the tax anticipation warrants.

The court then finds that the plaintiff is the owner of certain tax anticipation warrants of the taxes levied for the year 1929 aggregating the principal sum of $110,000 and finds from the evidence that the plaintiff upon said basis of computation is entitled to have and recover from the Board the sum of $128,913.50, plus interest. (R. 25)

Prior to the entry of the petitioners' judgments, the General Assembly, on July 12, 1937, passed an Act authorizing the Board of Education of the City of Chicago to issue bonds to pay judgment indebtedness (other than judgments for unpaid claims for school supplies, materials or services rendered) upon order or decree of any court of record theretofore or thereafter entered. (Illinois Session Laws of 1937, pp. 1083-1085; Ill. Rev. Stat. 1937, Ch. 122, Pars. 327.62-327.68)

One of the judgments above referred to was secured by F. J. Lewis. Pursuant to this statute, the Board in 1939 sought to issue and sell bonds for the purpose of paying his judgment. Leviton, a taxpayer, on behalf of himself and all other taxpayers, commenced a suit to enjoin the issuance of these bonds on the ground that the Act authorizing their issuance was unconstitutional, being in violation of Sec. 9 of Article 9 of the Constitution of the State of Illinois. The Supreme Court of the State of Illinois, in *Leviton* v. *Board of Education*, 374 Ill. 594, 605, held that the Act

of July 12, 1937, insofar as it provides for the issuance of bonds to discharge judgments based on liability arising out of unpaid tax anticipation warrants was void because of the prohibition contained in Section 9 of Article 9 of the State Constitution, and remanded the cause with directions to overrule the motion theretofore filed by the Board of Education to dismiss the complaint.

The case was re-docketed in the Circuit Court and the taxpayer's complaint remained the same as when the cause was remanded. The Board of Education filed an answer (R. 67 in *Lewis* v. *Board*) and Lewis was permitted to intervene (R. 51, in *Lewis* v. *Board*) and he filed a separate answer. (R. 51-57, in *Lewis* v. *Board*) Lewis sought to avoid the application of the principle of the established law of the State of Illinois (that a statute which undertakes to authorize the payment of tax anticipation warrants out of revenue other than the levy against which they are drawn, transcends State constitutional provisions) by having it determined that his judgment was final and conclusive of every question litigated in the case in which the judgment was entered and that the same questions could not be re-litigated in the proceeding brought by the taxpayer contesting the validity of the Act of the Legislature of 1937. (Illinois Session Laws of 1937, pp. 1083-1085, Ill. Rev. Stat. 1937, Ch. 122, Pars. 327.62-327.68) The Circuit Court enjoined the Board from issuing and selling the bonds. On appeal the State Supreme Court affirmed. In affirming that decree, the State Supreme Court held that it was not necessary to determine the validity of the judgment obtained by Lewis as owner of 1929 warrants, because the real question was whether any money could be raised by

taxation to pay bonds authorized for the payment of Lewis' judgment based on 1929 tax warrants or on a breach of trust. (*Leviton* v. *Board of Education*, 385 Ill. 599)

At the time Lewis intervened in the Leviton case, the other warrant holders including the Reconstruction Finance Corporation, who had secured judgments, filed a suit for a writ of mandamus (R. 1) seeking to compel the Board to budget their claims and levy taxes for their payment or to issue bonds to pay their judgments and levy new taxes to pay the bonds. (R. 38-39) These judgments were fully described in the petition and copies thereof were attached thereto. Each of the judgments therein set forth shows on its face the basis upon which it was secured. (R. 23-36)

The respondents answered, admitting the judgments were entered but denied any obligation upon the Board to pay them or include them in its annual budget. Respondents further alleged that under the Constitution of Illinois, the Board was required to provide a thorough and efficient system of free schools; that if it was required to make appropriation for the payment of the alleged judgments, it would not have sufficient income to pay said judgments or any part thereof and also continue to comply with its requirement to provide proper schools for children in the Chicago school district, and that it would be compelled to so reduce and curtail the school system and educational facilities that such children would not receive the common school education guaranteed to them by the State Constitution. Respondents in their answer also set forth the limit to which it could raise taxes, together with its resources and liabilities and anticipated school expenses, and that there was no money that could be

raised other than that necessary to defray the necessary expenses of the school system, and that it had no excess revenue to maintain the schools and pay the judgments amounting to over $10,000,000. (R. 40-56)

Petitioners filed a motion to strike which, under the Illinois Practice Act (Ill. Rev. Stats. 1943, Ch. 110, Par. 164, Sec. 40(2), admitted all allegations of fact, including the allegation that the Board had no funds available for the purpose of paying such judgments. The Circuit Court denied their petition for mandamus and on appeal the State Supreme Court affirmed. (*People ex rel. Reconstruction Finance Corp.* v. *Board of Education*, 386 Ill. 522, (R. 66-76) )

## ARGUMENT

### I.

**The Supreme Court of Illinois determined this case upon non-federal grounds adequate to sustain its judgment.**

The judgment of the Illinois Supreme Court does not depend on the decision of any federal question. It is based solely on non-federal grounds.

An examination of the petition for mandamus discloses that the relief sought was (1) to compel the Board to budget petitioners' claims and levy taxes for their payment, or (2) to issue bonds to secure funds to pay their judgments and levy taxes to pay the bonds. (R. 38-39)

The Supreme Court of Illinois stated the issue presented by the record thus:

> "* * * should the board be compelled by mandamus to budget these claims and levy taxes for their payment? * * * it is not necessary to determine the validity of such judgments in disposing of the real issue of whether the board of education can be compelled by mandamus to levy a new tax to pay judgments showing upon their face that to compel such act will require the board to violate the constitution.
>
> "No question of collateral attack is presented by this issue, but the question is whether the relators are entitled to the remedy sought under the disclosure made by their pleadings." (R. 70-72)

It is apparent that the State Supreme Court, in determining the issue, was considering merely questions of

local and not federal law and decided the case on two non-federal grounds.

The first of these grounds as stated by the court is:

> "The nature and character of the plaintiff's claim being fully disclosed upon the face of the judgment, and indicating facts which would require the officers to violate the constitution in order to levy a tax for its payment, mandamus may properly be refused, not because we invalidate the judgment, but because we cannot require public officers to violate the provisions of the constitution. The alternative prayer that the board be required to do all things necessary to issue bonds under the Judgment Refunding Act of 1937 requires no comment, because of our holding that it is unconstitutional. *Leviton* v. *Board of Education*, No. 27496." (R. 75)

The second non-federal ground is thus stated by the court:

> "Another equally cogent reason for denying *mandamus* in this case is the inability of the board of education to maintain public schools as is required by the constitution, and at the same time levy taxes to pay these judgments. The law has long been settled that the writ of *mandamus* is not a writ of right, and a court, in the exercise of wise judicial discretion, may, in view of the consequences attendant upon its issuance, refuse the writ. (*People ex rel. Akin* v. *Board of Supervisors*, 185 Ill. 288; *People* v. *Ketchum*, 72 Ill. 212) The necessity for the use of the entire revenue by a public body is sufficient to defeat application for a writ of *mandamus* to pay judgments; (*Town of Sparland* v. *Barnes*, 98 Ill. 595; *Board of Supervisors* v. *People*, 222 Ill. 9); and want of funds is a complete answer to a petition for *mandamus*. (*DeWolf* v. *Bowley*, 355 Ill. 530; *Board of Supervisors* v. *People*, 222 Ill. 9.) It is apparent from the financial situation of the board of education, admitted by the relators' failure to answer and dispute it, that it has no funds avail-

able for the purpose, conceding that the relators, on other grounds, were entitled to the writ." (R. 75-76)

Petitioners contend here that they urged a federal question in the State court to the effect that to permit a collateral attack on their judgments or to invalidate their judgments would be to deprive them of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution. The State Supreme Court in its opinion definitely pointed out that no question of collateral attack was presented by the issue, whether public officials can be compelled by mandamus to levy a new tax to pay judgments showing upon their face that to compel such act will require them to violate the State Constitution, and that it was not necessary to determine the validity of the judgments in order to determine whether a writ of mandamus should issue under the disclosures made in the petition that the judgments are based either on 1929 tax anticipation warrants or breach of duty of an officer of a quasi-municipal corporation as a basis of liability, neither of which could create a corporate liability under the Illinois Constitution. (R. 72-74; *Leviton* v. *Board of Education*, 374 Ill. 594, 602; Pet. Appendix 7-8)

The principles of law applied by the Supreme Court of Illinois are long established and were followed without deviation for many years before the warrants here involved were issued.

**It is the long settled Illinois law that tax anticipation warrants create no liability on the issuing body.**

In a series of decisions beginning with *City of Springfield* v. *Edwards*, 84 Ill. 626, 633, decided in 1877, the Supreme Court of Illinois established as the law of the State that tax anticipation warrants do not constitute an obligation between the taxing body and the purchaser or holder thereof; that no contractual obligation, either express or implied, on the part of the taxing body arises from the warrant, but that the holder thereof must look solely to the taxes against which the warrant was issued, if and when collected, for payment of the warrant, and that once the warrant is issued there is no further obligation upon the taxing body, either absolute or contingent, to do anything whereby its debt may be increased, and that the holder must rely solely upon the ability and fidelity of the revenue officer in the collection and payment of the money mentioned in the warrants. Among the cases so holding are the following: *Law* v. *People*, 87 Ill. 385, 400; *Fuller* v. *Heath*, 89 Ill. 296, 309; *Hodges* v. *Crowley*, 186 Ill. 305, 312; *Gray* v. *Board of School Inspectors*, 231 Ill. 63, 68, 73; *Booth* v. *Opel*, 244 Ill. 317, 327; *People* v. *Nelson*, 344 Ill. 46, 55; *Dimond* v. *Com'r of Highways*, 366 Ill. 503, 505-506; *People* v. *Wabash Ry. Co.*, 368 Ill. 497, 500-501; *The People* v. *Crane*, 372 Ill. 228, 232; *People* v. *Axelrod*, 373 Ill. 446, 448-449; *People* v. *M. Born & Co.*, 373 Ill. 490, 493; *Berman* v. *Board of Education*, 360 Ill. 535, *Leviton* v. *Board of Education*, 374 Ill. 594, 598, 599; *Leviton* v. *Board of Education*, 385 Ill. 599, 605; *The People* v. *Granada Hotel Corp.*, 381 Ill. 41, 45.

The tax anticipation warrant statute itself specifically provides:

"* * * warrants drawn and issued under the pro-

visions of this section shall show upon their face that they are payable solely from said taxes when collected and not otherwise * * *." (Smith-Hurd Ill. Rev. Stat. 1929, Ch. 122, Par. 155, Sec. 132)

This provision is written into the 1929 warrants.

**It is the long established Illinois law that quasi municipal corporations are not liable for breach of trust of their officers or for torts.**

Long before the 1929 warrants were issued it was established as the local law of Illinois that a school district, such as the Board of Education of the City of Chicago, is a quasi municipal corporation; that such quasi municipal corporations are not liable for breach of duty by their officers; that such corporations are involuntary quasi municipal corporations, existing under the general laws of the State for the purpose of civil and governmental administration with precise and limited public duties with restricted corporate functions co-extensive with the duties devolved upon them, and as such are not responsible to respond in damages for torts or for breach of trust. *Roumbos* v. *City of Chicago*, 332 Ill. 70, 77; *Melin* v. *School District*, 312 Ill. 376, 382; *Kinnare* v. *City of Chicago*, 171 Ill. 332, 334, 335; *Leviton* v. *Board of Education*, 374 Ill. 594, 598, 599; *Bradbury* v. *Vandalia Drainage Dist.*, 236 Ill. 36, 46; *Elmore* v. *Drainage Comrs.*, 135 Ill. 269, 273, 274.

In the last case mentioned the rule is tersely stated as follows: (p. 273-274)

> "* * * So, also, it is admitted law that municipal corporations proper, such as villages, towns and cities which are incorporated by special charters or voluntarily organized under general laws, are liable to individuals injured by their negligent or tortious

conduct, or that of their agents and servants, in respect to corporate duties. In regard to public involuntary quasi corporations the rule is otherwise, and there is no such implied liability imposed upon them. These latter,—such as counties, townships, school districts, road districts, and other similar quasi corporations,—exist under general laws of the State, which apportion its territory into local subdivisions, for the purposes of civil and governmental administration, and impose upon the people residing in said several subdivisions, precise and limited public duties, and clothe them with restricted corporate functions, co-extensive with the duties devolved upon them. In such organizations the duties, and their correlative powers, are assumed *in invitum*, and there is no responsibility to respond in damages, in a civil action, for neglect in the performance of duties, unless such action is given by statute. 2 Dillon on Mun. Corp., secs. 761, 762; Cooley's Const. Lim. 240, 247; *Hedges* v. *County of Madison*, 1 Gilm. 567; *Town of Waltham* v. *Kemper*, 55 Ill. 346."

**It is the long established Illinois law that the State Constitution prohibits taxation for non-corporate purposes.**

The courts of Illinois have always held that under the provisions of Section 9 of Article 9 of the Constitution of Illinois of 1870 and similar provisions in prior constitutions, the Board of Education or other public bodies in Illinois are prohibited from levying taxes which will be used for purposes other than corporate purposes. *Sleight* v. *People*, 74 Ill. 47, 49; *Livingston County* v. *Weider*, 64 Ill. 427, 431-432; *Washingtonian Home* v. *City of Chicago*, 157 Ill. 414, 428-429; *Midland Lumber Co.* v. *City of Dallas City*, 276 Ill. 172, 175; *Porter* v. *Lochr*, 332 Ill. 353, 360, 361; *Berman* v. *Board of Education*, 360 Ill. 535, 543, 546, 547; *Leviton* v. *Board of Education*, 374 Ill. 594, 605.

## FIRST ADEQUATE NON-FEDERAL BASIS OF STATE COURT DECISION

**Where affirmative relief is sought by mandamus the state court may examine the nature of the obligation sought to be enforced and deny the writ if to grant it would compel the public officers to violate the State Constitution or law. Determination of such question is one of local law.**

In the face of the foregoing long established rules of Illinois law the state court was confronted with the question as to whether it should issue a writ of mandamus to compel the respondents, Board of Education and its officers, to levy a tax or issue bonds for the payment of judgments where the petition disclosed upon its face that such judgments were based either on 1929 warrants or on a breach of duty of an officer of a quasi municipal corporation. Expressed differently—must the court require public officers to violate the provisions of the constitution and levy a tax for non-corporate purposes simply because the party who seeks mandamus to compel payment of a non-corporate liability appears in the guise of a judgment holder, when the illegal basis of his judgment appears in the mandamus petition and the judgment attached thereto?

The petitioners contend that the state court had no right to examine the judgments made a part of their mandamus petition on the ground that the basis of their judgments was no concern of the court wherein they were seeking mandamus to compel the payment thereof. The state supreme court examined the law on this purely local question and decided that neither the law nor public

policy required, but on the contrary the precedents and the constitution prohibited, the compelling of public officers by mandamus to levy illegal taxes or issue bonds to pay a non-corporate liability.

As recently as May 15, 1944 this court, in *Huddleston* v. *Dwyer*, 321 U. S.;—88 L. ed. 933, recognized the right of the highest court of the state to decide for itself the question as to municipal liability on special assessment bonds and held that this court is bound by such determination of the state court. That case was a suit by owners of special assessment bonds against a county in Oklahoma, alleging diversity of citizenship and seeking a judgment fixing the county's liability and asking mandamus to compel a tax levy for payment of assessments owed by the county and other relief. The District Court first dismissed the complaint, after which the Circuit Court of Appeals reversed and remanded. (*Dwyer* v. *Le Flore County*, 97 F. (2d) 823) The District Court then entered judgment directing the levy of the tax, which judgment was affirmed by the Circuit Court of Appeals (137 F. (2d) 383) after examination of the Oklahoma authorities. One of the county's defenses overruled by the Circuit Court of Appeals was that under Oklahoma law a county is without authority to levy and collect a tax in one year to pay improvement assessments which became due in an earlier year. Subsequent to the decision by the Circuit Court of Appeals on the second appeal, the Supreme Court of Oklahoma held in another case that counties under Oklahoma law are without authority to levy and collect a tax in one year to pay improvement assessments which became due in an earlier year, but that such installments could be paid only from a sinking fund levy. On certiorari, this court vacated the judgment and remanded the case to the Circuit Court

of Appeals with directions to reconsider in the light of the latest decisions of the Supreme Court of Oklahoma on the points of law involved. This court said at page 935 L. ed.

> "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, Federal Rules of Civil Procedure, Rules 69 (a), 81 (b), 28 U. S. C. A. following § 723 (c), 8 F. C. A. 1937 ed. title 28, Appx. 3, pp. 741, 747. It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. *Meredith* v. *Winter Haven*, 320 U. S. 228, ante 1, 64 S. Ct. 7. And a judgment of a federal court ruled by a state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer subjudice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 543, 85 L. ed. 327, 330, 61 S. Ct. 347."

When the Supreme Court of Illinois held in this case that mandamus might be properly refused because the nature and character of plaintiffs' claims, as was disclosed upon the face of the judgments, revealed facts that would require public officers to violate the State Constitution if they were compelled to levy a tax to pay the judgments, it was deciding a question of local law well within the right recognized by this court in the foregoing decision.

The decision of the Supreme Court of Illinois upon

this question of local law cannot in any sense be deemed unsubstantial, unfounded or illusory. This court, as well as other federal courts and state courts, has held, as the Supreme Court of Illinois held, that before it will issue a writ of mandamus to compel the payment of a judgment it may properly examine the basis of the judgment when the basis of the judgment appears in the petition for mandamus. If that examination discloses, as in the case at bar, that it was based on a liability never recognized by the courts, and to compel its payment would be to compel a public body and its officials to violate the state constitution, it will refuse to lend its aid to the enforcement thereof. *Brownsville* v. *Loague*, 129 U. S. 493, 503, 505; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 292, 293; *Freeland* v. *Williams*, 131 U. S. 405, 419, 420; *Louisiana* v. *Mayor, etc., of New Orleans*, 109 U. S. 285, 289; *Ward* v. *Joslin*, 186 U. S. 142, 152; *Smith* v. *Broderick*, 107 Calif. 644, 653-654; *Brunson* v. *Caskie*, 127 Ga. 501, 502, 503..

In *Freeland* v. *Williams*, 131 U. S. 405, Freeland had obtained a judgment against Williams for the value of cattle taken by Williams under orders as a soldier in the Civil War. Under the applicable law of belligerents, there was no liability for such injuries. This defense was asserted in the suit in which the judgment was entered but declared to be insufficient. Subsequent to the entry of the judgment, West Virginia adopted a constitutional provision prohibiting the enforcement of such judgments. The question presented to this court required going behind the judgment in order to ascertain whether or not it was of such a character as was unenforceable under the new state constitution. This the court did and found the judgment predicated on a doctrine of liability

of belligerents which was contrary to the law of the country.

In *Brownsville* v. *Loague*, 129 U. S. 493, relator sought to compel the payment of a judgment against a public body by mandamus. Under the law of Tennessee there was no inherent power in public corporations to levy taxes. The taxing power was limited to the levying of taxes for the purpose of paying corporate obligations only. The underlying basis of the judgment sought to be enforced by mandamus was bonds upon which there was no corporate liability. This court held, when it was asked to compel the public corporation by mandamus to exercise such specially conferred power of taxation, it would look to the basis of the obligation sought to be enforced and it would not compel the levying of taxes for the payment of the judgment where there was no authority to tax for the payment of the non-corporate obligation underlying the judgment.

Petitioners contend that the Brownsville case is distinguishable from the case at bar because in that case the relator relied upon a special taxing power and not upon his judgment alone. (Petitioners' Brief, p. 37) There is no basis for the claimed distinction. In Illinois, as in Tennessee, there is no inherent or general power in public corporations to levy taxes. Where such power exists in Illinois, it must find its source in Section 9 of Article 9 of the Illinois Constitution. By that section the legislature is vested with authority to delegate tax levying power to public corporations, but the tax levying power so delegated must be limited to the payment of corporate obligations of the taxing body. (See cases cited p. 18) Thus in the case at bar as in the Brownsville case, petitioners are seeking to compel pub-

lic officers to levy a tax for a purpose prohibited by the Constitution. The instant case is squarely within the Brownsville decision.

In *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292, 293, this court held that when it is asked to enforce a judgment it will look behind the judgment to ascertain whether the subject matter upon which the judgment is founded is within its jurisdiction. That case was an original action in this court by Wisconsin against a Louisiana insurance company under the provisions of the Federal Constitution giving this court original jurisdiction in actions between a state and the citizens of another state. The suit was in debt upon a judgment obtained by Wisconsin in one of her own courts against the Louisiana corporation. The basis of the judgment was a penalty provided by the Wisconsin statutes for doing an insurance business in Wisconsin without first having filed a financial statement with the State Insurance Commissioner. After deciding that the above mentioned constitutional provision did not give the court jurisdiction to enforce the penal laws of the various states, the question arose whether this court could look behind the judgment to ascertain that it was based upon a violation of the penal statutes. In holding that the underlying basis of the judgment determined the court's jurisdiction and that it could look behind the judgment to ascertain such basis, this court said at page 292:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of

examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

In *Louisiana* v. *Mayor, etc., New Orleans*, 109 U. S. 285, 289, relators sought to compel, by mandamus, the payment of judgments for damages arising out of rioting rendered under a state statute imposing such liability on municipalities. After the entry of the judgments the taxing power of the city was so curtailed by a subsequent constitution that, after payment of current expenses, no money was available to pay the judgments. This court did not hesitate to look behind the judgments to see whether they had the contractual basis necessary to render the contract clause of the federal constitution operative or to hold the said clause inapplicable when upon such inspection it appeared that the judgments were not founded in contract.

In *Ward* v. *Joslin*, 186 U. S. 142, 152, this court approved the action of a federal court in examining a judgment secured against a corporation to determine whether the guaranty of a note of a third person on which the judgment was based was within the powers of the corporation or was *ultra vires* in order to determine whether it would invoke its authority to enforce a Kansas statute making stockholders liable for an unpaid judgment against the corporation.

In *Smith* v. *Broderick*, 107 Cal. 644, 653-654, petitioner was assignee of claims of various creditors of the city and county of San Francisco, who had furnished the city with materials and services payable out of special funds for the fiscal year 1892-93, and obtained judgment on the assigned claims. Thereafter he brought mandamus to enforce the auditor to pay said judgment. The

auditor's answer showed the judgments to be based on claims payable only out of the Street Department fund and such surpluses as remained in the general fund for the fiscal year 1892-93 and that both funds were exhausted and had many claims outstanding against them. The California Supreme Court after examining the judgment sought to be enforced found that to compel its payment out of levies for subsequent years would be to compel officers to violate the state constitution and therefore affirmed the denial of the writ, saying at pp. 653-654:

> "The contracts forming the basis of the plaintiff's judgment were not entered into upon the faith that any tax would be levied with which to meet them, but with full knowledge that the municipality was prevented from paying them out of any fund other than the revenue that had already been provided for the fiscal year ending June 30, 1893. None of the remedies which then existed for the enforcement of these contracts have been in any respect impaired. If, at the time of entering into the obligation, there is a limitation upon the extent to which a municipality may enter into such obligation, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, there is no violation of any provision of the constitution, or of any obligation of the municipality, in insisting that the person dealing with it shall be bound by the terms of the law, as they existed when he entered into his dealings with the municipality. The same reasons which would justify the refusal of a writ of mandate to enforce the collection of a judgment by the levy of a tax which is forbidden by law, require the refusal of the writ when sought to enforce a judgment by applying thereto, in contravention of an express provision in the constitution, moneys that have already been collected, and are in the treasury."

The Georgia Supreme Court decided a case involving practically the identical problems here presented in *Brunson* v. *Caskie*, 127 Ga. 501. There a judgment was obtained against a county for injuries received in a defective road. The county, under the basic law of Georgia, was not liable for such a debt and the Constitution of the State of Georgia did not permit the commissioners to levy a tax unauthorized by the Constitution. In denying mandamus and determining the local law of that State, the court said at pages 502-503:

> "It is clear that if the claim for damages which was the subject matter of the plaintiff's suit had not been reduced to judgment, the county commissioners could not be compelled to pay the alleged claim. Further, the county commissioners cannot lawfully levy a tax unauthorized by the Constitution, nor can they divert a fund raised by taxation to the payment of a claim or demand for the satisfaction of which no tax could be constitutionally levied. 'Before an officer can be required to pay out public money, or be justified in doing so, those who demand its payment should be able to show a clear provision of the law which entitles them to receive it.' *Kennedy* v. *Seamans*, 60 Ga. 612; *Houston County* v. *Kersh*, 82 Ga. 252, 255."

In answer to a claim that the judgment finally adjudicated the county's liability, the court held that it was not precluded from ascertaining whether it was one which the court was authorized to enforce and quoted with approval the holding of this court on that subject in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292, 293.

Long ago this court established the rule that a judgment holder has no right to a levy of taxes which he did not have before the entry of his judgment. This was determined in *U. S.* v. *County of Macon*, 99 U. S. 582, a proceeding to compel the County to levy a tax for the

purpose of paying a judgment in favor of the relator against the County for the amount of certain coupons upon bonds that had been issued by the County. The statute under which the subscription to the bonds was made contained limits upon the amount of tax that might be levied by the County to pay the same and it was held by this court that although a judgment had been rendered upon the coupons the judgment creditor was not entitled to a writ of mandamus directing the levy of a tax for the payment of the judgment, saying: (p. 591)

> "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand, and of the amount that is due, but it gives him no new rights in respect to the means of payment."

## SECOND ADEQUATE NON-FEDERAL BASIS OF STATE COURT DECISION

### Necessity for use of entire revenue by a public body justifies denial of mandamus to pay judgments.

A second adequate non-federal ground, which in itself was a sufficient basis for the decision, was the admitted inability of the Board to maintain the public schools as required by the Constitution of the State of Illinois and at the same time levy taxes to pay these judgments even if petitioners were entitled to the writ on other grounds. This financial condition was admitted by the pleadings, and this court must accept it as a fact from the record in this case. (*Truax* v. *Corrigan*, 257 U. S. 312, 324)

It is the settled law of Illinois and of the United

States that a public body cannot be required to apply any of its current revenue necessary for the payment of its current expenses in satisfaction of a judgment secured against it. Where its taxing power is limited and insufficient to raise more than the funds so required and appropriated, a court cannot require the public body to use its general funds for the payment of a judgment and a writ of mandamus will not issue for that purpose.

Want of funds is a complete answer to a petition for mandamus and the necessity for the use of the entire revenue by a public body is sufficient to defeat application for a writ of mandamus to pay judgments. *Town of Sparland* v. *Barnes*, 98 Ill. 595; *Board of Supervisors* v. *People*, 222 Ill. 9, 12, 13; *DeWolf* v. *Bowley*, 355 Ill. 530, 538; *The People* v. *Brown*, 281 Ill. 390, 394; *East St. Louis* v. *U. S.*, 110 U. S. 321, 324; *U. S.* v. *Thoman*, 156 U. S. 353, 360; 18 R. C. L. 231, 232.

**Petitioner's Cases Distinguished.**

An examination of the entire petition for writ of certiorari discloses that petitioners' contention is that wherever a judgment, however baseless, has been entered against a quasi municipal corporation and is unpaid, a court must issue a writ of mandamus to compel its payment even though to do so will require the officers of such quasi municipal corporation to violate the constitution.

It is the position of respondents that the state courts of the State of Illinois had a right and duty to examine the judgments which were set up in and made a constituent part of the petition for mandamus in order to determine whether the basis of the judgment was a corporate obligation for the payment of which a new tax

could be levied to pay the judgments directly, or a tax to be levied for the purpose of paying a bond issue the proceeds of which were to be used for the purpose of paying said judgments.

In such a situation the court does not go behind the judgments for the purpose of invalidating them. It merely examines them for the purpose of determining whether it will lend its aid to their enforcement or deny such aid because to give it would violate the Constitution of the State of Illinois. Notwithstanding this, petitioners cite the following cases to support their contention that their judgments are immune from collateral attack: *U. S.* v. *New Orleans*, 98 U. S. 381; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Harshman* v. *Knox County*, 122 U. S. 306; *Santa Fe County* v. *Coler*, 215 U. S. 296; *Moore* v. *Town of Browning*, 373 Ill. 583; *Town of Lyons* v. *Coolidge*, 89 Ill. 529; *Nugent* v. *Toman*, 372 Ill. 170; *Carney* v. *Marseilles*, 136 Ill. 401; *People* v. *Village of Bradley*, 367 Ill. 301; *Drainage Com'rs* v. *Rector Dr. Dist.*, 266 Ill. 536.

An examination of these cases will disclose the soundness of the appraisal by the Illinois Supreme Court of certain of the cited cases and others of similar import when it stated in its opinion (*People ex rel. Reconstruction Finance Corpn.* v. *Board of Education*, 386 Ill. 522) at pages 533-534:

> "* * * In all of these cases power upon the part of the municipality to create the debt existed, and taxes could be levied for its payment. Judgments founded upon such claims were held impervious to attack because, there being power to create the debt, all facts necessary to justify a recovery are concluded by the judgments. Most of the cases, however, recognize the distinction pointed out in the *Loague* case, and recognize its application.

"The distinction between the cases seems plain. (a) If there is authority of law for the creation of the debt, whether it takes the form of bonds, claims, or otherwise, and may be paid from a levy of taxes, *mandamus* may be employed because, there being authority in law to pay such class of claims, a judgment is deemed conclusive of the merits thereof; thus a municipal officer is not compelled to violate the law in doing the things proper to bring about payment. (b) If there is no authority for the creation of the debt, or if a levy of taxes for its payment would be in direct violation of a positive statute or the constitution, and such fact appears as a part of plaintiff's case when seeking *mandamus*, the court will not issue the writ to compel a violation of the constitution, because the judgment gives him no new rights with respect to its payment. *United States* v. *County Court*, 99 U. S. 584, 25 L. ed. 331; *Beadles* v. *Smyser*, 209 U. S. 403, 52 L. ed. 854."

Petitioners also cite a group of cases on the proposition that the taking of property of one and giving it to another violates the constitution: *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55; *Missouri Pacific R. Co.* v. *Nebraska*, 164 U. S. 403; *Ochoa* v. *Hernandez*, 230 U. S. 139; *C. St. P. M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162. A consideration of those cases discloses that they deal with situations not analogous to the one presented here.

In the case at bar the refusal of the writ of mandamus does not take away anything from the petitioners which they under the law were entitled to have, nor does it give to the Board of Education anything which belonged to the petitioners. The proceeds from the tax collections were paid to the holders of the tax warrants in full in numerical order of their issuance according to the universal practice and custom that had existed in the State of Illinois ever since tax anticipation warrants were

issued. It was not until after the tax collections of $52,694,000 had been so distributed that the petitioners complained.

When the petitioners purchased their warrants they knew that practice and custom. The judgments gave them no better right than they had before. Certainly it cannot be said that a court which refuses to compel public officials to levy taxes for a non-corporate purpose takes away property of one and gives it to another. As a matter of fact, to issue a writ would be to do that very thing for it would then be taking property of the taxpayer and giving it to the petitioners in payment of obligations not payable by taxation. To compel the taxpayer to pay new and additional taxes in 1943 or later years to pay 1929 warrants or judgments secured on them would constitute double taxation.

The case at bar is in no way analogous to cases cited by petitioners such as *McCullough* v. *Virginia*, 172 U. S. 102; *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, where rights long recognized by courts or established by constitutional or statutory provisions existing at the time claimants' rights accrued were taken away by subsequent constitutional or statutory amendments. All rights which petitioners here had under the warrants, they still have but they seek additional rights by virtue of the fact that they have secured judgments. Neither the constitution nor the statutes of the State of Illinois have been changed in any way for the purpose of reducing or modifying their original rights. The determination by the Supreme Court in this case that mandamus should not issue is in conformity with the law at the time they purchased their warrants and as it had always theretofore existed, namely, that public officers could not be required

to levy taxes for non-corporate obligations, and that quasi municipal corporations are not liable on tax anticipation warrants or for breach of trust by their officers in connection therewith.

The cases cited by petitioners to support their contention that a court has no right to look at the judgment in order to determine whether or not a mandamus writ should issue do not support their position. For example, in *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, cited by petitioners, this court approved the principle that a court has a right to examine the judgment pleaded in the mandamus proceeding for the purpose of determining whether the municipality had the right originally to create the debt and whether the judgment was based on contract. In *Drainage Dist.* v. *Highway Com'rs*, 238 Ill. 521, the court likewise examined the judgment to determine whether or not the obligation on which said judgment was based was a valid one.

The difference between those cases and the case at bar is that in those cases the court, upon examination, found that the judgments were based upon corporate obligations and therefore issued the writ, whereas the Supreme Court of the State of Illinois in the case at bar, upon examination of the judgment, found that it was not based on a corporate obligation and refused the writ.

Another group of cases involving collateral attack cited by petitioners, such as *Harshman* v. *Knox County*, 122 U. S. 306; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Voorhees* v. *Bank of United States*, 35 U. S. 449, are cases of direct appeals from lower federal courts, to this court. On such direct appeal this court reviews the whole case and decides whether error has been committed under its conception of the law involved. (*Sterling* v.

*Constantin*, 287 U. S. 387, 393, 394) State courts have the same right. Hence in cases seeking a review of State court decisions this court will not substitute its view for that of the State court where no federal constitutional question is involved even though their views may differ from those of the state court. (*Murdock* v. *Memphis*, 20 Wall. 590) Rules of *res judicata* which are merely rules of estoppel by judgment are solely rules of local procedure and involve no constitutional question.

Petitioners argue that the court did not decide the case on the points raised by the litigants. This is not supported by the record, but, assuming for the sake of argument that the court had determined the case on matters raised by neither party, we submit that a litigant does not have a constitutional nor even a legal right to have his case decided on certain limited points raised by the litigants. This is particularly so where public rights and interests are involved. In such case it is not only the right but the duty of the court to ascertain the proper basis of the decision even though neither party raises the point, for to do otherwise might constitute a precedent which would impair such rights. (*Heppes Co.* v. *City of Chicago*, 260 Ill. 506, 512) All courts seek to render correct decisions that are good so that such cases may be a guide, not a hindrance to future litigation.

Other cases cited by petitioners involve questions which are not even remotely analogous to those in this case. Thus in *City of Cairo* v. *Campbell*, 116 Ill. 305, there was no dispute about a judgment and the only question was whether the demand to include it in the budget was made in time: in *Pennsylvania* v. *Wheeling & Belmont Co.*, 59 U. S. 421, where a judgment was abrogated by an act of Congress, this court held that Con-

gress had such power in matters involving a public right; in *Hodges* v. *Snyder*, 261 U. S. 600, the court held that a curative act passed after the Supreme Court had decided that the original act was invalid did not deprive the taxpayer of a claimed property right in the judgment; in *District of Columbia* v. *Eslin*, 183 U. S. 62, this court decided that an appeal should be dismissed because Congress had taken away the right to sue the district and, a determination of the merits would be futile, since the court could not enforce any judgment it might enter.

When the State Supreme Court held in the case at bar: "The nature and character of the plaintiffs' claim being fully disclosed upon the face of the judgment and indicating facts which would require the officer to violate the constitution in order to levy a tax for its payment, mandamus may properly be refused, not because we invalidate the judgment, but because we cannot require public officers to violate the provisions of the constitution" (R. 75; *People ex rel. R. F. C.* v. *Board of Education*, 386 Ill. 522); it determined the litigation upon non-federal grounds adequate to sustain its judgment.

## II.

**Where the determination of a state court is upon non-federal grounds adequate to sustain the judgment, this court has no jurisdiction to review.**

It has long been established by the decisions of this court commencing with the case of *Klinger* v. *Missouri*, 80 U. S. 257, 263, that even where the state court judgment rests upon two grounds, one of which is federal and the other non-federal in character, this court's jurisdiction fails if the non-federal ground is independent of

the federal ground and adequate to support the judgment. This rule has been reiterated in a long line of cases since that time, among which are: *Arkansas Southern Railroad Co.* v. *German National Bank*, 207 U. S. 270, 275, 276; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 165; *Municipal Securities Corpn.* v. *Kansas City*, 246 U. S. 63, 69; *Petrie* v. *Nampa & M. Irrig. Dist.*, 248 U. S. 154, 157; *McCoy* v. *Shaw*, 277 U. S. 302, 303; *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210.

Thus in *Arkansas Southern Railroad Co.* v. *German National Bank*, 207 U. S. 270, 275, 276, this court held that the determination by the State Supreme Court that the railroad was liable under terms of its bill of lading for failure to deliver the goods in accordance with the provisions of the bill of lading regardless of whether the state statute imposing such liability was constitutional, was a determination of a non-federal question sufficient to deprive this court of jurisdiction of the federal question whether the state act was repugnant to the Constitution of the United States as an unauthorized state attempt to regulate commerce among the states.

In *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 165, this court held that a determination by the state court that there was an estoppel constituted a non-federal question and would not review the federal question of whether the company claiming rights to divert water had been deprived of the same without due process of law.

In *Municipal Securities Corpn.* v. *Kansas City*, 246 U. S. 63, 69, this court dismissed for want of jurisdiction a suit originally brought to recover on city issued special tax bills, by law made liens on lots. Thereafter the

city took the lots for a public improvement, thereby rendering the lots non-taxable. The State Supreme Court held that the suit was upon the tax bill, and under the constitution and the statute of the state the payment of tax bills by the city was forbidden and there could be no recovery on them, and that plaintiff assignee did not secure by his assignment the tort rights of the original holder against the city arising out of the destruction of the lien and only source of payment. The state court's determination of the scope of the assignment and of the issues presented to it was held to be a non-federal question sufficient to deprive this court of jurisdiction.

In *Petrie* v. *Nampa & M. Irrig. Dist.*, 248 U. S. 154, 157, this court held that the decision of the State Supreme Court, that a land owner's objection in a special assessment proceeding was prematurely made, was a determination of a question of local law broad enough to support the judgment, sufficient to deprive this court of jurisdiction to review the decision as to whether or not the special assessment deprived the property owner of his property without due process of law because his property was not benefited by the improvement.

In *McCoy* v. *Shaw*, 277 U. S. 302, 303, this court dismissed a writ of error on the ground that the State Supreme Court, in dismissing a suit to enjoin the collection of a gross production tax on a royalty interest on land patented to an Indian as his homestead, on the ground that under the state statute the petitioner had an adequate remedy at law by paying the tax under protest and suing for its recovery, decided a non-federal question which was independent of the federal question that the tax on the royalties was in violation of the treaties between the United States and the Chickasaw Indians under the Act of Congress.

In *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210, writ of certiorari was dismissed for want of jurisdiction on the ground that the state court in deciding that a void arbitration provision in the contract tainted the entire contract, determined a non-federal question independent of the federal question of whether the contract was in violation of the Sherman Anti-Trust Act.

The State court's decision rests squarely upon non-federal grounds which are independent and adequate to support the State court's judgment, as hereinbefore demonstrated, and therefore the Supreme Court of the United States should decline to take jurisdiction.

Respectfully submitted,

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(42)

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FILED
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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

## No. 330

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. RECONSTRUCTION FINANCE CORPORATION, ETC., AND 210 OTHER RELATORS,

*Plaintiffs-Petitioners,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, SR., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, AND B. L. MAJEWSKI, AS MEMBERS, AND JAMES B. McCAHEY, AS MEMBER AND PRESIDENT,

*Defendants-Respondents.*

## REPLY OF PETITIONERS TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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**M. O. Hoel,**
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**Comments on respondents' restatement of the case.... 2**

**Summary of reply to respondents' argument.**

Respondents do not challenge that substantial federal questions were presented by petitioners and not decided by the Supreme Court of Illinois, but rest their answer on the ground that the Illinois Supreme Court properly based its decision on non federal grounds. Therefore, the only issues presented are (a) whether the non-federal grounds of decision are tenable and substantial, and (b) whether the rights of petitioners and the merits of this case can be adjudicated finally without a decision of the federal questions admittedly plainly presented to the Court by petitioners..... 5-6

If either of these alternatives is answered in the negative then it is clear petitioners have been deprived of a decision of their claims of federal rights. These petitioners are entitled to have their constitutional rights judicially declared and to the judgment of this Court on the question whether federal rights claimed by them in the State Court were denied or not given due recognition ..... 5-6

Lawrence v. State Tax Comm., 286 U. S. 276, 282.
Ward v. Love County, 253 U. S. 17, 22.
Rogers v. Alabama, 192 U. S. 226, 230.

The merits of petitioners' claims against the Board of Education were finally adjudicated and conclusively settled by the decrees in the accounting suits, and neither the Supreme Court of Illinois nor any other court has jurisdiction or power to inquire into the claims or re-examine the decrees upon any ground other than lack of jurisdiction of the courts which entered the decrees.....
.....12, 17, 23, 25, 30, 32, 33, 37, 38, 43, 44

Cooper v. Reynolds, 77 U. S. 308, 316.
Fauntleroy v. Lum, 210 U. S. 230, 237.
Milliken v. Meyer, 311 U. S. 457, 462.
Louisiana v. St. Martin's Parish, 111 U. S. 716, 721.

The decrees adjudicated the private property rights of petitioners under the Constitution and are binding obligations of the Board of Education. Upon entry they became private property of petitioners protected by the Constitution. To destroy the decrees by refusing to petitioners the right to require their payment by any means afforded under the law for payment of judgments against the Board is to destroy the decrees and to take the property of these petitioners without due process of law .....21-25, 33

Lincoln County Court v. United States, 105 U. S. 739.
Collins v. Welsh, 75 Fed. (2d) 894, 897.
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U. S. 421, 431.

The rule prohibiting inquiry into the merits of their decrees was one of the attributes of each of the decrees which petitioners asserted could not be impaired in the face of the protection of their property rights afforded them under the Constitution of the United States. The Supreme Court could not properly disregard this attribute of the decrees and proceed in the face thereof to inquire into the merits of the decrees without deciding the question whether such action on its part would contravene the constitutional rights of petitioners 22

When the Supreme Court of Illinois and respondents attempt to go behind the decrees held by petitioners and relitigate the issues already adjudicated and rest the denial of the writ of mandamus on the invalidity of the original claims, they do not escape the claims of rights of petitioners under the Federal Constitution. The rights of petitioners under the Constitution of the United States were inherent in the claims adjudicated by the decrees and are inherent in the question whether the decrees may be re-examined or their enforcement refused. And even if the Supreme Court of Illinois had the power to go behind the decrees or if the case had been before that Court on appeal from the decrees the case could not have been decided without deciding the constitutional questions .....7-8, 11, 20-25

The non-federal grounds of decision advanced by the Supreme Court are untenable and unsubstantial. They are without a single supporting authority and at variance with every decided case in the books. Furthermore, the rights of petitioners under the Constitution of the United States and the merits of the litigation are such that neither can be determined in the absence of a decision of the federal questions..7-9, 11, 12, 17, 21-25

Even if the question of the nature and merits of the original claims were open for consideration it appears that the grounds of decision of those claims advanced by the Court are not only untenable but are not of such character as made a decision of the federal questions unnecessary. In fact, the grounds of decision injected additional federal questions into the case to the extent that the Court stated the original claims to be something other than they actually were and as they were stated in the complaints in the accounting proceedings .....9-11, 13

(1) The original claims were not based upon tax warrants nor upon breach of trust by officers of a quasi-municipal corporation. They were for money had and received by the Board to the use of petitioners.....9-11, 13-19

(2) Even if the claims had been based on breach of trust or other wrongdoing by agents of a quasi-municipal corporation, such fact would not have militated against the claims. The protection afforded a citizen by the Constitution against seizure of or interference with his property on the part of the State, applies to all types of State agencies and to all acts of interference, be they described as tortious, or abuses of power, or breaches of trust .....13-19

(3) The question whether the Board of Education deprived petitioners of their property without due process of law in violation of the Fourteenth Amendment was inherent in the original claims .....10, 14

(4) Ward v. Love County, 253 U. S. 17, 24, bears directly upon both the merits of the original claims as well as upon the rights

under the Constitution plainly asserted by petitioners to be inherent in those claims. That case involved the question of the liability of a quasi-corporation for money had and received where tax money, which was the property of plaintiffs, was wrongfully extracted from such plaintiffs by the corporation's officers, was received into the corporation's treasury, and thereafter paid by the corporation's officers to others than the plaintiffs whose money it was. This Court held the quasi-municipal corporation liable...10, 15, 45

(5) Even if the defense of non-liability of a municipal corporation on Illinois tax warrants or the defense of non-liability of a quasi-corporation for negligent acts or breach of trust by its officers had been available as defenses before the decrees were entered, they certainly cannot be said to be available after those decrees have been entered, particularly in a collateral suit brought to enforce such decrees .....12, 17

Nowhere, either in the court's opinion or in respondents' answer, is it even intimated that the courts which entered the decrees were without jurisdiction or power to adjudicate the claims asserted in the accounting suits. The Supreme Court of Illinois re-examined the decrees for alleged errors of law despite the well settled axiom of the law which denies such judicial power to the Supreme Court of Illinois or any other court. In so doing the Court usurped judicial power and deprived petitioners of their property without due process of law.....18, 21, 22, 37

The Supreme Court of Illinois did not mention any of its many decisions called to its attention in the briefs of petitioners holding that a judgment, whether against a municipal corporation or a private individual, may not be reexamined by any court in a collateral proceeding upon any ground other than want of jurisdiction on the part of the court which entered the judgment. Nor did it mention the many cases in which it had held municipal corporations of all types liable for money had and received under circumstances substantially identical with those at bar. The Court

did not question those decisions. It ignored them. In failing and refusing to apply to this case the well settled law of Illinois the Court denied to petitioners the redress afforded other litigants under substantially identical circumstances and thereby denied to petitioners the equal protection of the law ..... 12-13, 19

The mere assertion by the Supreme Court of Illinois of its right to examine into the decrees on grounds other than ones going to the jurisdiction of the courts which entered the decrees did not relieve the Court from the duty of deciding the claim of petitioners that the Court was precluded by the Fourteenth Amendment from making such inquiry ..... 19-26

In any event this ground of decision is untenable. None of the authorities cited in the opinion of the Supreme Court of Illinois, and in respondents' answer, support the asserted right of the Court to go behind the decrees and inquire into the validity of the claims adjudicated by such decrees. The fact is the cases cited in the opinion of the Supreme Court of Illinois and in respondents' answer are authorities holding to the contrary of that proposition. They serve conclusively to demonstrate that the non-federal grounds of decision advanced by the Supreme Court of Illinois are wholly untenable, illusory and unsubstantial ..... 26-45

The added non-federal ground of decision resting on present inadequacy of funds is untenable and in itself deprives petitioners of their property without due process of law. The Supreme Court of Illinois did not merely temporarily withhold from petitioners a means of enforcing their decrees, but it permanently denied to them any right, by any means, to have their decrees paid ..... 45-48

The grounds upon which respondents seek to distinguish the authorities cited in the petition are without merit ..... 48-52

All of the grounds which this Court has often stated impel it to bring before it for review the record and judgment of a State Court are present in this case ..... 5, 52-53

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

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**No. 330.**

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THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. RECONSTRUCTION FINANCE CORPORATION, ETC., AND 210 OTHER RELATORS,

*Plaintiffs-Petitioners,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, SR., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, AND B. L. MAJEWSKI, AS MEMBERS, AND JAMES B. McCAHEY, AS MEMBER AND PRESIDENT,

*Defendants-Respondents.*

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## REPLY OF PETITIONERS TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners, People of the State of Illinois, on the relation of Reconstruction Finance Corporation and 210 other holders of judgments against Board of Education of the City of Chicago respectfully submit to this Court their reply to the answer of respondents.

**Comments on respondents' restatement of the Case.**

Despite the full statement of the case set forth in the supporting brief annexed to the petition, (pp. 20-29,) respondents completely restate the case, offering as an excuse that "some of the facts" were omitted from petitioners' statement of the case. (Ans. p. 4.) Respondents do not point out the facts which they claim were omitted from petitioners' statement. However, aside from assertions of argument and conclusions, for which no record references are supplied, there is but one subject which is alluded to which does not appear in the statement of the case set forth in the petition.

At pages 6 and 7 of their answer respondents, with the obvious view in mind of supporting their later argument (Ans. p. 31-32) that the Board, in disbursing the proceeds of collection of the anticipated taxes, acted in accordance with what respondents claim to have been "a universal custom and practice" of the Board and other municipal corporations in Illinois known to petitioners and other holders and purchasers of and dealers in tax anticipation warrants, state "facts" not supported by the record.

In support of their statement in this regard respondents refer this Court to R. 166-168, 171, 173, 175 and 180 in the companion case, No. 331, *Leviton* v. *Board*. These record references are to offered evidence tendered by respondents in the course of the trial of *Leviton* v. *Board* to support its claim of the existence in Illinios in normal times and under normal circumstances of an alleged custom and practice respecting the payment of tax anticipation warrants. Respondents neglect to call the attention of this Court to the fact that objections to the offer were sustained on the ground, among others, that the offered proof did not show or tend to establish the existence of any such

custom and practice as was claimed by the Board and that thereupon the evidence was excluded. (R. 182-183, *Leviton* v. *Board*, No. 331.) Furthermore, the defense made by the Board, based upon the issue of existence of an alleged custom and practice, was decided against the Board in the accounting suit and is no longer open for consideration. The Supreme Court of Illinois so held on the appeal in *Leviton* v. *Board*. (R. 244 in case No. 331.) What is more, the offered proof showed conclusively that there was no such custom and practice as is asserted by respondents, (R. 169-173, 279-280, *Leviton* v. *Board*, No. 331,) even assuming the alleged custom and practice asserted by respondents was applicable to the unusual and abnormal situation respecting the 1929 tax anticipation warrants of the Board.

At page 32 of their answer respondents assert, without supporting record reference, that "when the petitioners purchased their warrants they knew that practice and custom." Aside from the fact that the evidence offered by the Board in the trial of the companion case of *Leviton* v. *Board* and excluded by the Court established that there was no custom and practice as was asserted, neither the evidence excluded by the Court nor any other evidence established or tended to establish that respondents had any knowledge of the alleged custom and practice asserted or any other custom and practice in respect of payment of tax anticipation warrants.

At page 7 of the answer respondents infer that petitioners and other judgment holders were tardy in asserting their claims against the Board in the first instance, and that the Board was prejudiced thereby. This defense was made by the Board in the original judgment proceedings (R. 78, in *Hutchinson* v. *Board*, No. 332) and was determined against it upon several grounds, some of which this Court will find elaborated upon in the opinion of the

United States District Court in *Norfolk & Western Ry. Co.* v. *Board*, 14 Fed. Supp. 475, affd., 88 Fed. (2d) 462.

At page 7 of their answer respondents refer as part of their statement of the case to *Berman* v. *Board of Education*, 360 Ill. 535, 542, but fail to call the attention of this Court to the fact that in that case the Board of Education (respondent here) was seeking to establish it had constitutional authority to pay *in full* of principal and interest 1929 tax anticipation warrants issued by it, *irrespective of the fact that sufficient tax collections had not and would not be collected to pay such tax warrants.*

We have made specific reference to the so-called additional facts stated in respondents' statement of the case for the reason that we think they have been included therein with the purpose in mind of influencing adversely the view this Court may take of the equities of petitioners' original claims and thereby also influencing adversely the exercise by this Court of its discretion to grant the petition for writ of certiorari in this case.

The natural tendency of petitioners is to elaborate upon the many compelling grounds, both legal and equitable, which influenced the Circuit Court and the Superior Court of Cook County in the accounting proceedings, as well as the United States District Court in a similar proceeding involving the same issues, (*Norfolk & Western Ry. Co.* v. *Board*, 14 Fed. Supp. 475, affd. 88 Fed. (2d) 462,) to reject the foregoing defenses of the Board, but they have resolved not to follow the error of respondents and burden this Court with matters which are outside the issues presented in this case.

**Reply to respondents' argument.**

Petitioners respectfully submit that respondents' answer serves to point up and emphasize the fact stressed in the petition that there are present in this case and the companion cases (*Leviton* v. *Board*, No. 331, and *Hutchinson* v. *Board*, No. 332) the grounds which this Court has often stated* impel it to exercise its discretion to award its writ of certiorari to bring before it for review the record and judgment of a state court,—namely

(1) titles, rights, privileges and immunities under the Constitution of the United States were plainly asserted and claimed by petitioners in the state courts in apt time and at every available opportunity;

(2) the federal constitutional questions presented and the constitutional rights claimed were substantial;

(3) the claims and assertions of federal constitutional rights made by petitioners were not decided by the state court nor otherwise given due recognition;

(4) the rights of the petitioners could not be determined without a decision of the federal constitutional questions which had been plainly asserted;

(5) the non-federal grounds upon which the State Court placed its decision were not tenable or substantial and were not so independent of the federal questions or otherwise of such character as made the decision of the federal constitutional questions unnecessary; and

(6) petitioners were aggrieved by the disposition of the case made by the State Court.

Respondents do not challenge, and therefore concede, that petitioners in apt time and at every available oppor-

* Pet., pp. 16-18; Brief, pp. 30, 51-52.

tunity plainly asserted their claims under the Constitution of the United States, in the Circuit Court of Cook County and in the Superior Court of Cook County and in the Supreme Court of Illinois, and that the federal questions thereby presented were not decided nor the claims of said rights given due recognition. Their contention that the petition for the writ should be denied rests solely on the argument that the Supreme Court of Illinois decided the case on non-federal grounds adequate to sustain its judgment independent of a decision of the federal questions. Therefore the only issues presented by respondents' answer are (a) whether the non-federal grounds, upon which the Supreme Court of Illinois placed its decision, are tenable and substantial, and (b) whether the rights of petitioners and the merits of this case can be determined and finally adjudicated without decision of the federal constitutional questions which were plainly asserted by petitioners.

If either of these alternatives is answered in the negative then it is clear petitioners have been denied the right to a decision of their claims of federal rights. These petitioners have the right to the judgment of this Court on the question of whether federal rights claimed by them in the State Court were denied or not given due recognition. *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282; *Ward* v. *Love County*, 253 U. S. 17, 22; *Rogers* v. *Alabama*, 192 U. S. 226, 230.

We respectfully suggest that the foregoing alternatives in themselves present substantial federal questions and that petitioners are entitled to the judgment of the Court with respect thereto.

I.

**(a) The non-federal grounds of decision upon which the Supreme Court of Illinois placed its decision are untenable and unsubstantial.**

**(b) The rights of petitioners and the merits of this case are such that they cannot be determined and finally adjudicated without a decision of the federal questions plainly asserted by petitioners in the State Court.**

The rights under the Constitution of the United States plainly claimed by petitioners in the courts below, the decision of which was required to be made by the Supreme Court of Illinois, are stated at pages 6-9 of the petition, and summarized at index pages i-ii of the petition.

Respondents first undertake to defend the refusal of the Supreme Court of Illinois to pass upon or give due recognition to the rights under the Constitution of the United States, plainly presented in that Court by petitioners, on the false premise used by that Court to evade a decision of these questions,—*i. e.*, that the decrees obtained by petitioners in their accounting suits were based either on the tax anticipation warrants held by them or on a breach of duty by the Board's officers. Ans., p. 15.

Petitioners have shown in their brief attached to the petition (pp. 39-40) that these asserted non-federal grounds are illusory because they had no existence in fact and were contrary to the records in the accounting suits and we show in this reply under the following sub-headings that the grounds are untenable if they had been in the case.

The Supreme Court of Illinois, and the respondents, in attempting to defend its judgment, go behind the decrees in the accounting suits and inquire into the validity of

petitioners' claims against the Board which were adjudicated by said decrees. To say the original claims of petitioners were not valid begs the question whether the Court had power and jurisdiction, as against assertions by petitioners of rights in their decretal judgments under the Constitution of the United States, to re-examine the claims in the face of a judgment which had conclusively adjudicated them against the Board.

But the Supreme Court of Illinois having gone behind the judgments and the respondents now defending that action of the Court upon the same grounds which the Court advanced in its opinion, the question arises whether the non-federal grounds of decision upon which the Court held the claims to be invalid are sufficiently tenable and substantial and independent to render unnecessary a decision of the federal questions presented by the claims themselves, *assuming those claims had been before that court in the first instance on direct appeal.*

If either of these issues on the merits of the claims which were determined in the accounting suits is answered in the negative, then petitioners' right to writ of certiorari is clear.

We believe that neither of these questions was in issue in the Supreme Court of Illinois since their consideration was concluded by the judgments, but since they are advanced by respondents as grounds making against the jurisdiction of this Court, we are compelled to point out wherein they are without merit.

A.

**Aside from the question of the conclusiveness of the decretal judgments, the grounds of decision, as applied to the claims adjudicated by the judgments are neither tenable nor of such character as would have rendered a decision of the federal questions unnecessary had the claims been open for examination.**

(1) *The original claims were not based on tax warrants. They were for money had and received. The question whether petitioners had been deprived of their property without due process of law was a question inherent in such claims.*

The pleadings in the accounting suits and the decrees entered conclusively show that the decrees were not based on the tax anticipation warrants as contracts creating a general obligation of the Board, but rather were based upon the liability of the Board to account to petitioners for moneys assigned to and owned by them and received by the Board into its treasury to the use of petitioners. R. 23-36, in *People* v. *Board;* and R. 1-133 (pleadings) and R. 133-176 (decree) in *Hutchinson* v. *Board*, No. 332.

These petitioners have never contended that the tax anticipation warrants held by them created a general obligation of the Board. (Pet., pp. 39-40.) Their claim made in their accounting suits was for moneys admittedly assigned to them by the Board and pledged to the payment of their warrants which the Board received into its treasury for their use and which it did not pay over to them as their respective interests required the Board to do. (R. 1-41 (complaint), *Hutchinson* v. *Board*, No. 332.) The decree entered in the accounting suits required the Board to account for such of these moneys as were actually received

into the Board's treasury to the use of petitioners, and nothing more. R. 23-36, *People* v. *Board*, and R. 133-176, *Hutchinson* v. *Board*, No. 332.

These moneys belonged to the petitioners as warrant holders when they were received by the Board of Education from the County Collector pursuant to Section 243 of the Revenue Act of Illinois (Smith-Hurd's Ill. Stat., 1929, ch. 120, par. 228) and the Board had no proprietary interest in them. They were property protected by the Constitution of the United States. Under the established law of Illinois, having actually received these moneys into its treasury and having subjected them to its control under sections 132 and 135 of the School Act (Appendix to Pet., pp. 29, 30) the Board was under duty to pay over these moneys to the true owners as their respective interests appeared, and when it failed in this duty the Circuit Court and the Superior Court of Cook County properly entered money decrees in the accounting suits brought against the Board by these petitioners. *Trustees of Schools* v. *Trustees of Schools*, 81 Ill. 470, 473; *Highway Commissioners* v. *City of Bloomington*, 253 Ill. 164, 175; *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 339-342. This is the universal rule. *Ward* v. *Love County*, 253 U. S. 17, 22, 24; *Chapman* v. *County of Douglas*, 107 U. S. 348, 355; *Bank of Burlington* v. *City of Murphysboro* (C. C. A., 7), 96 Fed. (2d) 899, 903; *Getz* v. *City of Harvey* (C. C. A., 7), 118 Fed. (2d) 817, 824; *Strough* v. *Jefferson County*, 119 N. Y. 212, 23 N. E. 552; *Center School Township* v. *School Commissioners*, 150 Ind. 168, 49 N. E. 961.

The tax warrants held by petitioners were mere muniments showing the title of petitioners to a share of the moneys, and the decree in favor of each petitioner was for his pro rata share of the moneys received by the Board to

his use, plus statutory interest for the period these moneys had been withheld.

Whether the Board was under duty to receive the moneys from the County Collector is immaterial. It did receive the moneys, the moneys belonged to the petitioners and to no one else, the Board did not pay petitioners their moneys, and the money decrees merely required the Board to perform its legal duty under the law of Illinois and the Constitution of the United States.

For the same reasons, the question whether the Board was under a duty prior to the receipt by it into its treasury of the anticipated taxes to see that such taxes were paid to petitioners when collected by the County Collector is equally immaterial. The admitted fact is that the Board of Education did not stand on its right, if it had such right, to decline to take any part whatsoever in the matter of the payment over to petitioners of the moneys belonging to them upon their collection by the County Collector. Instead, it received these funds into its treasury and made them subject to its order, and its order alone, by virtue of the provisions of Section 135 of the School Act. (Appendix to Pet., p. 30.) Thereafter it disbursed those funds by way of exercise of the exclusive power and control vested in it by said statute to pay out any and all funds in its treasury. By so doing it deprived these petitioners of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit that the first ground of decision respecting the merits of the claims, assuming they were now open to examination, is not only wholly untenable and inadequate, but is not of such character as rendered unnecessary the decision of the federal questions inherent in the claims themselves.

In any event, this phase of the merits of the claim was conclusively settled in favor of these petitioners and against the Board by the decrees in the accounting suits and no respectable authority holds that the issues settled by the decrees can be re-examined in this collateral proceeding. Certainly none of the authorities relied upon by respondents in their petition nor any of the authorities cited by the Supreme Court of Illinois in its opinion in any way tend to support this proposition. The only case relied upon which even comes close to supporting respondents' contention that a court in a mandamus proceeding brought to enforce a judgment may re-examine the questions settled in the judgment proceeding is *Brunson* v. *Caskie*, 127 Ga. 501, 56 S. E. 621. Aside from the several grounds upon which this case is distinguished later in this reply*, the decision in the Georgia case is squarely contrary to the decisions of the Supreme Court of Illinois in *People* v. *L. & N. R. Co.*, 350 Ill. 274, 277, 183 N. E. 233, 235; *Moore* v. *Town of Browning*, 373 Ill. 583, 585, 586, 588, 27 N. E. (2d) 533, 535, 536; *Carney* v. *Village of Marseilles*, 136 Ill. 401, 407, 26 N. E. 491, 493; and *Marabia* v. *Thompson Hospital*, 309 Ill. 147, 157, 140 N. E. 836, and to the decision of the Appellate Court of Illinois in *Seither & Cherry Co.* v. *Board of Education*, 283 Ill. App. 392, 403. This was called to the attention of the Supreme Court of Illinois not only in the petition for rehearing (R. 85-86) but also in petitioners' briefs on the merits, copies of which have been certified to this Court. None of these decisions is mentioned or cited in the opinion of the Supreme Court of Illinois. In the face of these cases the decision of the Court is untenable. No recognition was given by that Court to the claim that in failing to apply or even mention these decisions the Court was denying to these petitioners the redress afforded other litigants under substantially

*Pages 42 to 44.

identical circumstances, and thereby denied to petitioners the equal protection of the law.

(2) *The protection afforded a citizen by the Constitution of the United States against seizure of or interference with his property on the part of the State, applies to all types of State agencies and to all acts of interference, be they described as tortious or as breaches of trust, or otherwise.*

Respondents contend (Ans. p. 17), the holding of the Supreme Court of Illinois that the claims were not corporate obligations of the Board of Education because the Board of Education, being a quasi municipal corporation, is not liable for breaches of trust by its officers or for torts committed by its officers or agents, is an adequate and tenable non-federal ground of decision of the issues raised in the case at bar and is such an independent ground of decision as rendered unnecessary the decision of the federal questions raised on the record.

The pleadings in the accounting suits and the decrees entered show that the decrees were not based on a breach of duty of the Board's officers, (R. 1-41 (complaint) and R. 133-176 (decree) in *Hutchinson* v. *Board*, No. 332.) but if they had been, the asserted ground of decision is neither tenable nor independent of the federal questions inherent in the claims. The obligation imposed by the Constitution of the United States upon a State or any agency of a State to compensate its citizens for property of such citizens taken by the State or its agency does not depend upon the nature of the agency as a municipal corporation proper or as a quasi municipal corporation, nor does it depend upon whether the acts by which the property was taken were or were not tortious in character. *Scott* v. *McNeal*, 154 U. S. 34, 45; *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 233.

This Court said in the latter case (166 U. S. 233), "that the prohibitions of the [Fourteenth] amendment refer to *all* the instrumentalities of the States." In *Scott* v. *McNeal*, 154 U. S. 34, 45, this Court said: "The Fourteenth Article of Amendment of the Constitution of the United States, * * *, ordains, 'nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to *all* acts of the State, whether through its legislative, its executive, or its judicial authorities. And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, was intended 'to secure the individual *from the arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice.'" [Emphasis ours.] In the subsequent case of *C. B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, 239, this Court said "that the prohibitions of the [Fourteenth] Amendment refer to *all* instrumentalities of the State." This Court there pointed out that the Fourteenth Amendment protects the property of citizens from *any* interference or appropriation by the State or *any* of its agencies, whether done in pursuance of a state constitutional provision or a legislative enactment or whether done by the State itself or by one of the subordinate agencies of the State, be it denominated a municipal corporation proper or a quasi municipal corporation, and whether done directly by taking the property of one person and vesting it in another or in the public, or indirectly through abuse of law.

It has been frequently held by this Court that the prohibition of the Fourteenth Amendment against the seizure of or interference with private property by the state or any

of its agencies applies as well where the seizure or interference is the result of a misuse or abuse of power as where it is the result of the regular exercise of power. *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 287; *Raymond* v. *Traction Co.*, 207 U. S. 20, 35.

In *Ward* v. *Love County*, 253 U. S. 17, 24, this Court held that the quasi municipal corporation which was the party defendant in that case, was obligated by virtue of the Constitution of the United States to account to the plaintiffs for tax moneys which it wrongfully collected from plaintiffs and thereafter wrongfully disbursed to others. This Court held that although the action of the county officials acting on behalf of the quasi municipality was wrongful and tortious, the tax moneys collected were moneys received by the county to the use of plaintiffs and that the county could not lessen its liability to account by showing that it had paid over to others a portion of such moneys which belonged to plaintiffs. The rule that a quasi municipal corporation is liable for property had and received by it to the use of another, irrespective of the circumstances under which the property is obtained by it, obtains in Illinois. *Trustees of Schools* v. *Trustees of Schools*, 81 Ill. 470, 373; *Highway Commissioners* v. *City of Bloomington*, 253 Ill. 164, 175; *Sangamon County* v. *City of Springfield*, 63 Ill. 66, 71.

It is pertinent to observe that it was not necessary to the maintenance of the accounting suits that either the Board of Education or its officers should have been guilty of either wrong or negligence. Since it is no defense to an action against a quasi municipal corporation, brought by the owner of property or money received by such corporation to its use, that the property or money was delivered or paid by such corporation to others than the owners thereof, (*Ward* v. *Love County*, 253 U. S. 17, 24) then it is

immaterial whether the corporation or its officers breached a trust or committed a negligent or tortious act in disposing of such property to others than its owners.

Such cases as *Elmore* v. *Drainage Com'rs.*, 135 Ill. 269, 25 N. E. 1010, *Kinnare* v. *City of Chicago*, 171 Ill. 332, 49 N. E. 536, *Bradbury* v. *Vandalia Drainage Dist.*, 236 Ill. 36, 86 N. E. 163, *Melin* v. *School District*, 312 Ill. 376, 144 N. E. 13, *Roumbos* v. *City of Chicago*, 332 Ill. 70, 163 N. E. 361, cited at page 17 of respondents' answer, all of which involved trespass on the case for damages, have no application to a suit for accounting in the nature of an action for money had and received. Cases involving actions *ex delicto* are not in point as to liability of a quasi municipal corporation in actions *ex contractu*. Furthermore, *Bradbury* v. *Vandalia Drainage Dist.*, 236 Ill. 36, 86 N. E. 163, does not support the proposition advanced by respondents that a quasi-municipal corporation is never liable for failure of its officers to do their duty. That case involved a drainage district, which is at the bottom strata of the hierarchy of municipal corporations. It erected a levee which so dammed a stream that plaintiff's land was subjected to damages by overflow. Plaintiff sued the drainage district for damages in an action of trespass on the case. The Supreme Court of Illinois held the district accountable. The Court itself criticized its decision in the *Elmore* case (which case is cited and quoted at pages 17-18 of respondents' answer) in generalizing on the non-liability of quasi municipal corporations for wrongs committed by its officers. The portion of the opinion in the *Elmore* case quoted in respondents' answer, when viewed in the light of the criticism of that decision in the later case of *Bradbury* v. *Vandalia Drainage Dist.*, is without force, not to mention the fact that the holding in the *Elmore* case has no application here in any event.

This issue was one of the issues determined by the Circuit Court and by the Superior Court of Cook County in the accounting suits and is concluded by the decrees entered in those cases. Even assuming the decrees were made subject to inquiry when petitioners sought to invoke the processes of the courts for the enforcement of their judgments, it is obvious that the court could not dispose of the question of the validity of the claim without deciding the claims of federal constitutional rights of petitioners which were inherent in the claims themselves and upon which the claims were in part bottomed. Therefore it necessarily follows that the decision of the Supreme Court of Illinois, that the claims upon which the judgments were based were not corporate obligations of the Board under the Illinois Constitution because (as asserted by the Court) they were based on breaches of trust by officers of a quasi-municipality, did not dispose of the essential federal question inherent in the cases as to whether or not the claim was a corporate obligation of the Board under the Constitution of the United States, *irrespective of any alleged limitations of state law.*

Even if the defense of non-liability of a quasi municipal corporation for negligent acts or breach of trust by its officers had been available as a defense before the decrees were entered in the accounting suits, it certainly cannot be said to be available after those decrees have been entered, particularly in a collateral suit brought to enforce such decrees. *Carneu* v. *Village of Marsailles*, 136 Ill. 401, 407, 26 N. E. 491, 493; *Moore* v. *Town of Browning*, 373 Ill. 583, 585, 588, 27 N. E. (2d) 533, 535, 536; *Marabia* v. *Thompson Hospital*, 309 Ill. 147, 140 N. E. 836.

In the *Marabia* case a default judgment had been entered against the defendant hospital, a charitable institution, in a tort action for damages for personal injuries

suffered by plaintiff as the result of the negligent acts of one of the defendant's agents, and, after the expiration of the term of court at which the judgment was entered, the hospital moved to vacate the judgment on the grounds *inter alia,* (309 Ill. 150-151) that the hospital was a charitable corporation and under the well settled law of Illinois could not be made liable for tort based upon the negligent acts of one of its agents and that the judgment was void and could not be enforced against it. The Supreme Court of Illinois, while conceding the fact of the nonliability of the defendant upon the claim adjudicated against it by the judgment, held (309 Ill. 157) that the judgment conclusively settled the liability of the hospital; that the claim upon which the judgment was based could not be inquired into in a collateral proceeding brought to enforce such judgment; and that the judgment was not void because "The court does not lose jurisdiction because the plaintiff has not stated a good cause of action"; and that "Whether the question of the defendant in error's liability is settled by the decisions of this court or not, that question does not go to the jurisdiction of the Circuit Court." In a later case (*Seither & Cherry Co.* v. *Board of Education*, 283 Ill. App. 392, 403, 404) the Appellate Court of Illinois, following the *Marabia* case and other like decisions of the Supreme Court of Illinois, held that a judgment against a Board of Education could not be attacked by such quasi municipal corporation in a subsequent suit on the ground that the claim which the judgment adjudicated was admittedly void because attempted to be incurred by the Board after it had reached its Illinois constitutional debt limit.

Each of these cases was called to the attention of the Supreme Court of Illinois in the briefs of these petitioners, copies of which have been certified to this Court (see appel-

lants' reply brief, pp. 15-16) but no mention of them is made in the opinion of the Supreme Court of Illinois. Instead it advances a new, fallacious and wholly untenable theory of its own, not advanced by either party, nor discussed in any of the briefs, never before heard of in Illinois jurisprudence, and at variance with all the previous decisions of the Court, none of which are mentioned in the opinion and as to all of which it maintained absolute silence in the face of vigorous protest by these petitioners.

Aside from the fact that the authorities above discussed establish that the ground of decision of non-liability for tort is untenable as applied to petitioners' claims, and does not render unnecessary a decision of the federal questions inherent in the claims, assuming the claims were open for examination, the failure and arbitrary refusal of the Court to apply the well settled law denied to petitioners the redress afforded other litigants under substantially identical circumstances and thereby denied to petitioners the equal protection of the law.

B.

**The mere assertion of the Supreme Court of Illinois that it had power to inquire into whether or not the claims adjudicated were corporate obligations of the Board and to grant or deny enforcement of the judgments depending upon its decision of that question, is not an adequate non-federal ground of decision which rendered it unnecessary to pass upon the federal questions presented.**

We turn now to a discussion of the contentions of respondents respecting the holding of the Supreme Court of Illinois that it has power in a mandamus proceeding brought to enforce a judgment or decree against a municipal corporation entered by a court of general jurisdic-

tion to inquire into the matter of the validity of the claim adjudicated and to grant or withhold judicial process for enforcing the judgment, depending upon the court's view of the validity of the claim adjudicated.

The premise advanced by the Court in its opinion, and now sought to be maintained by respondents, is that the judgments are not corporate obligations if the claims adjudicated by the judgments were not corporate obligations, and this being so, the claims may be inquired into.

It is not denied by respondents in their answer, nor by the Supreme Court of Illinois in its opinion, that the Circuit Court and the Superior Court of Cook County are courts of general jurisdiction and that they had jurisdiction of the accounting suits and the power to decide the issue of the corporate liability of the Board of Education with respect to the claims asserted by petitioners, nor is it anywhere denied by respondents or by the Supreme Court of Illinois that the Circuit Court and the Superior Court of Cook County actually determined such issues against the Board in the several accounting suits. Nor did the Court declare the judgments invalid as respondents asked. It declined to pass upon that question.

It appears to be admitted by respondents, as it must be, that judgments and decrees, as such, against Illinois public corporations are corporate obligations within the Constitution of Illinois and that there is no escape from making provision for discharging the judgment obligation. (Authorities, Pet., p. 32.) But it is asserted that the decrees in the case at bar differ from other decrees in that it appears from the face of the decrees that the claims which the Circuit Court and the Superior Court of Cook County had jurisdiction and power to and did adjudicate against the Board are claims which were not corporate obligations of the Board under the Illinois Constitution. The propo-

sition is advanced that in a proceeding for a writ of mandamus to enforce a decree against an Illinois public corporation entered by a court of general jurisdiction the court may inquire into the merits of the claim upon which the decree is based to determine for itself, irrespective of the adjudication by the court which entered the decree, whether the claim is based upon a corporate obligation of the public corporation. (Pet., pp. 13-15.)

It is said that this inquiry is not a collateral attack upon the decree, nor is it an inquiry into the question of the validity of the decree. What this argument amounts to is that a court may, in a case in which mandamus is sought to enforce a judgment against a municipal corporation, ignore and disregard the judgment, ignore and disregard the fact that the court which entered the judgment had jurisdiction and power to enter it, and treat the case as though no judgment had been entered. Apparently it is intended that this is to be a special rule for the benefit of municipalities alone, for, as we have pointed out,* the Supreme Court rejected the same contention when made with respect to other litigants, (*Marabia* v. *Thompson Hospital*, 309 Ill. 147, 140 N. E. 836,) a fact ignored by the Court in its opinion in this case. These contentions, advanced by respondents and by the Court, are elaborated upon at pages 19 to 28 of the answer. They beg the very questions at issue in this case, *i. e.*, are the final money decrees held by petitioners, (having been entered by courts of competent jurisdiction,) property within the protection of the Fourteenth Amendment of the Constitution of the United States, and may the private property rights of these petitioners in their money decrees be destroyed by refusing to them the remedy heretofore given to all judgment holders against municipal corporation for the enforcement of judgments

* This reply, pp. 18-19.

against such corporation, in the absence of a finding that the judgments are void because the court which entered the judgments was without jurisdiction or power to enter them?

We hasten to add that the Supreme Court of Illinois could not decide the case before it, even assuming it had the right to inquire into the validity of the claims adjudicated by the decrees, without determining, upon making inquiry into the adjudicated claims, the rights under the Constitution of the United States plainly asserted by petitioners to be inherent in the claims adjudicated against the Board and inherent also in the judgments themselves.

Furthermore, the Supreme Court of Illinois could not decide the case before it without determining the question of whether a refusal to enforce the decrees, whatever the non-federal grounds advanced might be, would destroy the judgments and thereby deprive petitioners of vested rights under the Constitution of the United States plainly asserted by them.

The claims under the Constitution of the United States made by petitioners (Pet., pp. 32-36) are such that, even if the case had come before the Supreme Court of Illinois on an appeal on direct review of the decrees rather than by way of this collateral proceeding, that Court could not have determined the issues on the appeal without determining whether or not refusal of the court to sustain the claims as obligations of the Board would permit the Board of Education to take the property of petitioners and deprive petitioners of their property without due process of law in violation of the Constitution of the United States. Consequently, when respondents adopt in their answer the position advanced by the Supreme Court of Illinois in its opinion,—that the only issue is whether the claims on which the judgments were based were corporate

obligations under the Illinois Constitution,—they beg the real questions involved and overlook the fact that another issue to be determined is whether or not, irrespective of the Illinois Constitution, rights, titles and privileges of petitioners under the Constitution of the United States would have been denied to petitioners had the decrees not been entered in the first instance and would be denied to petitioners by failure to enforce the decrees when entered.

Petitioners also asserted in the State Court that, irrespective of the reason advanced, neither the Supreme Court of Illinois nor any other court had judicial power or authority, in the face of petitioners' constitutional rights, to inquire into the validity of the claims upon which the decrees were based. (Pet., pp. 36-38.) In *Cooper* v. *Reynolds*, 77 U. S. 308, 310 this court said that the rule that a final decree or judgment entered by a court of competent jurisdiction is not subject to re-examination for mistake of law "has often been held by this court, and by all courts, *and it takes rank as an axiom of the law.*" (Emphasis added.) The Supreme Court of Illinois proceeded to make such an inquiry without passing upon the claim of petitioners that such action on its part was a usurpation of judicial authority and resulted in depriving petitioners of their rights under the Constitution.

Petitioners also asserted that the Supreme Court of Illinois in examining into the basis of the decrees stated and decided a case which was not presented by the record or by the briefs of the parties and in so doing denied to petitioners due process of law guaranteed by the Constitution of the United States. (Pet., pp. 39-40.) Obviously, a decision of this claim of federal constitutional right could not properly be avoided by the Supreme Court of Illinois without depriving petitioners of their Constitutional right to have that question adjudicated. However, the Court failed to pass upon that question.

The petitioners asserted in the State Court that to hold their rights were adjudicated by the judgments of the Supreme Court of Illinois in the *Leviton* v. *Board of Education* cases (374 Ill. 594, 30 N. E. (2d) 497; 385 Ill. 599, 53 N. E. (2d) 596), to neither of which any of the petitioners were parties, and in which the interests of the actual parties thereto were adverse to petitioners, would be to deny petitioners the due process of law guaranteed them by the Constitution of the United States. (Pet., pp. 7-8.) Despite this claim of federal right by petitioners the Court proceeded to apply its decisions in the *Leviton* cases as adjudications of the rights of petitioners.* The mere assertion of the Court that it had power under State law to inquire into the claims adjudicated against the Board cannot be said to render unnecessary a decision of this particular federal question.

The Supreme Court of Illinois could not decide the case before it without determining these and other claims of rights plainly asserted by petitioners under the Constitution of the United States. By failing or refusing to decide or give due recognition to these federal questions and these claims of federal constitutional rights the Supreme Court of Illinois denied to these petitioners their day in court, deprived them of their property without due process of law, and denied them the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

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* For example, at one point in its opinion (R. 72), the Court said of the judgments that they "should never have been entered, because of the reasons set out in *Leviton* v. *Board of Education*." Furthermore, in the companion case in this Court, *Hutchinson* v. *Board*, #332, the Court dismissed the appeal of the Board as moot on the ground that the questions presented—whether the claims and judgments were corporate obligations—had been determined in the *Leviton* cases.

To say merely that the decrees will not be enforced because to enforce them will compel the respondents to violate the Constitution of Illinois, is merely another way of saying the decrees are erroneous and were the result of a mistake of law and hurdles (not decides), all the federal questions presented by petitioners. The fact that the State Constitution is brought into the case is a red herring. If the claims are invalid the fact that their invalidity is predicated on the State Constitution is immaterial. They would be just as invalid if the reason for invalidity was a provision of statute or a rule of the common law. If the judgment is conclusive in the one case it must likewise be conclusive in the other.

If, as petitioners contend, and as the Illinois decisions without exception hold, the decrees conclusively settle the validity of the claims, that they are not subject to examination by any court on any ground other than the jurisdiction of the Court which entered them, and that therefore the decrees are corporate obligations, then enforcement of those decrees does not require acts in violation of the Constitution of Illinois or in violation of any other law. *Drainage Com'rs.* v. *Rector Drainage Dist.*, 266 Ill. 536, 540, 107 N. E. 895, 897; *People* v. *Cairo*, 50 Ill. 154, 165; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 278, 183 N. E. 233, 235; *People* v. *Village of Bradley*, 367 Ill. 301, 305, 11 N. E. (2d) 415, 418. And it would be no defense to a denial of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States if it did. *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 229; *McCullough* v. *Virginia*, 172 U. S. 102, 123; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, 431.

C.

**None of the authorities cited in the opinion of the Supreme Court of Illinois, and in respondents' answer, supports the right of the Court to inquire into the claims adjudicated by the judgments. The truth is that the decisions relied upon are authorities holding to the contrary and serve conclusively to demonstrate that the non-federal grounds of decision advanced by the Supreme Court of Illinois are at odds with every decided case in the books, are untenable, illusory and unsubstantial.**

The soundness of the contention of respondents made at pages 21 and 22 of their answer, that the non-federal grounds of decision advanced by the Supreme Court of Illinois are tenable, adequate and substantial, is predicated upon seven decisions of this Court, a decision of the Supreme Court of California, and a decision of the Supreme Court of Georgia. *Huddleston* v. *Dwyer*, 321 U. S. 88; *Brownsville* v. *Loague*, 129 U. S. 493, 503, 505; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292, 293; *Freeland* v. *Williams*, 131 U. S. 405, 419, 420; *Louisiana* v. *Mayor, etc. of New Orleans*, 109 U. S. 285, 289; *Ward* v. *Joslin*, 186 U. S. 142, 152; *United States* v. *County of Macon*, 99 U. S. 582; *Smith* v. *Broderick*, 107 Cal. 644, 653-654, 40 Pac. 1033; *Brunson* v. *Caskie*, 127 Ga. 501, 502, 503, 86 S. E. 621. An examination of these cases reveals that they not only do not support the proposition for which they are advanced by respondents and for which they were cited in the opinion of the Supreme Court of Illinois, but that each, when properly analyzed, is to the extent it is at all applicable to the case at bar an authority supporting the contentions advanced by these petitioners.

**Huddleston v. Dwyer.**

At pages 20 to 22 of their answer respondents contend that the question of whether or not a State Court may in a mandamus proceeding brought to enforce a judgment against a municipal corporation inquire into the validity of the claim adjudicated by the judgment and refuse to enforce the judgment in the event it is of the opinion that such claim is not a valid claim against the municipal corporation is purely a question of state law.

In support of this proposition respondents cite (Ans., pp. 20-21) the recent opinion of this Court in *Huddleston* v. *Dwyer*, 321 U. S. 88. That case supports neither the decision of the Supreme Court of Illinois nor the position taken by respondents in their answer. The proceeding was not a suit on a judgment but a direct appeal to the United States Circuit Court of Appeals. Furthermore, neither party was asserting any claims or rights under the Constitution of the United States nor were there any federal constitutional questions presented. The case was one which would have been required to be commenced in the State of Oklahoma had it not been for the existence of diversity of citizenship between the parties. The rights of the parties, both procedural and substantive, depended exclusively on the law of the State of Oklahoma. Unlike the case at bar the judgment involved in that case was, as this Court pointed out, *sub judice*. The case is authority only for the now well settled proposition that where a case in the federal courts involves only questions of state law and no federal questions are presented on the merits, the Federal Court must ascertain and apply the state law as that law may appear from time to time during the entire period the proceeding in the Federal Court remains *sub judice*.

**Brownsville v. Loague.**

The next case cited in support of the contention that the Supreme Court of Illinois had power to examine into the claims adjudicated by the decrees is *Brownsville* v. *Loague*, 129 U. S. 493. This case does not hold, as respondents state, that a court may, in a proceeding brought to enforce a final judgment entered by a court of competent jurisdiction against a municipal corporation, go behind that judgment and determine whether the claim adjudicated by the decree was a valid corporate obligation of such corporation. In that case judgment had been obtained on bonds issued by a municipal corporation after the authorizing statute, which was the only source of authority for the issuance of the bonds and the levying of taxes to pay the bonds, had been repealed. At the time the judgment was obtained there was no authority, statutory or otherwise, for the levy of taxes or the application of funds for the payment of any judgments whatsoever. Consequently, as stated by this Court (Opinion, p. 496), petitioner alleged that his "only remedy to enforce the collection of his judgments is that awarded by the Act authorizing the issue of the bonds * * *." This Court then held that having been thus invited by the judgment holder to go behind the judgments to the bond authorization act for the only claimed authority to levy taxes to pay the judgment, it must of necessity inquire whether or not the obligation for the payment of which the statute authorized taxes to be levied actually existed. Therefore, since the bonds had been issued after the authorizing statute had been repealed, this Court necessarily held that the condition which would bring into effect the special taxing power relied on by the judgment holder did not exist. Where, as in the case at bar, the judgment holder relies alone upon the judgment for process to enforce it against the corporation, the normal and universal

rule which has obtained in this Court and in the courts of Illinois since their inception (until the instant decision), is that the judgment is conclusive of the validity of the claim as a corporate obligation of the municipal corporation and of its power and duty to bring about payment of the judgment by any means afforded to such municipal corporation under the law for payment of judgments generally. See authorities, Pet., pp. 32, 42.

This Court in *Franklin County* v. *German Bank*, 142 U. S. 93, 100, explained *Brownsville* v. *Loague* on the foregoing grounds. After discussing its decision in *Brownsville* v. *Loague*, this Court stated (142 U. S. 101) that it knew of no case holding that the effect of a final judgment, when offered in evidence in a distinct and collateral action, to be anything other than conclusive of all questions within the issues of the judgment proceeding.

Among many other authorities likewise explaining *Brownsville* v. *Loague* are *City of Mohall* v. *First Nat. Bank*, 105 Fed. (2d) 315, 317; *Equitable Investment Trust Co.* v. *Board of Commissioners*, 86 Kans. 708, 121 Pac. 1097, 1098; and case note in 9 L. R. A. (N. S.) 1002, 1006.

In view of the apparent contention of respondents that inquiry into the validity of the claim upon which the judgment is based may be made if evidence of the nature of the claim appears on the face of the record, a further holding of this Court in *Franklin County* v. *German Bank* on this question is pertinent. One of the contentions made by the municipal corporation in that case was that the bonds upon which judgment had been entered were invalid, were not corporate obligations of the municipal corporations, and that, since this fact appeared upon the face of the record on appeal, the court had power to inquire into that issue. In holding otherwise, this Court said (142 U. S. 100), "But we know of no case which goes to the

extent of holding that where a court having complete jurisdiction of the case has pronounced a decree upon a certain issue, such issue may be retried in a collateral action, even although the evidence upon which the case is heard is sent up with the record."

It may be well to observe in this connection that in so far as the conclusive effect of the judgment as an adjudication of the claim is concerned, any recital by the Court of the ground upon which it entered the decrees is not only immaterial, but likewise is not binding upon the party who obtained the judgment. As long as the subject matter of the suit is within the jurisdiction of the court the judgment itself is conclusive of the liability of the party against whom it is entered, irrespective of the reasons which might have been given by the court for its adjudication, and whether the Court was right or wrong. *Langnes* v. *Green*, 282 U. S. 531, 534-535. The fact the Court entering judgment states a particular ground of its own for so doing, cannot alter the actual theory or basis of claim asserted in the pleadings of the successful party. Even on direct review of a judgment a party may support the judgment upon any grounds, even to the extent of advancing grounds at variance with those advanced by the Court. *Langnes* v. *Green*, 282 U. S. 531, 538-539; *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435.

**United States v. County of Macon.**

*United States* v. *County of Macon*, 99 U. S. 582 (Pet. pp. 27-28) presented issues substantially identical with those involved in *Brownsville* v. *Loague*, and is distinguishable on the same grounds. In that case railroad construction bonds were issued by Macon County, Mo., pursuant to a Missouri bond statute which authorized a special tax of 1/20 of 1 per cent to be levied for the purpose of paying

such bonds. The county also had authority under other statutes to levy taxes at the rate of ½ of 1 per cent for general corporate purposes. Bonds issued under the statute were not paid and judgment was obtained on the bonds against the county. It appeared that the revenue produced by the special tax was insufficient, even when augmented by any surplus of tax collections levied for general purposes, to pay either the bonds or the judgments rendered thereon.*

The holders of the judgments sought to compel the county by a writ of mandamus to levy a new tax in addition to the general and special tax levies authorized by statute. There was no statute in existence which authorized the levy of any taxes in addition to those above mentioned. This Court held (99 U. S. 591) that it had no power to bring into existence and to compel exercise by the county of a power of taxation for which there was no statutory or other authority under the law. This Court remarked that "We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation."

Contrary to the assertion made by respondents in their answer (pp. 27-28) this Court did not inquire into the validity of the claim upon which the judgment was based or regard the judgment as other than conclusive of the issue of the liability of the municipal corporation upon the claim which the judgment had adjudicated against it.

When viewed in the light of the limited issue presented to and determined by this Court in that case it clearly ap-

* Prior to the decision of this Court in the *Macon* case, it had been held by this Court in *United States* v. *Clark*, 96 U. S. 215, 217, that holders of such bonds were entitled to judgment against the county upon the unpaid bonds and to compel payment of the judgment, not only from the proceeds of collection of the special tax levy, but also from any surplus of general funds remaining in the treasury of the municipal corporation after payment of current general expenses and obligations.

pears that the limited portion of this Court's opinion quoted at page 28 of respondents' petition has a meaning other than that which respondents seek to attribute to it.

That this Court did not intend to hold the proposition which respondents seek to attribute to this Court appears from this Court's discussion of the case in its subsequent decision in *Ralls County* v. *United States*, 105 U. S. 733. That case was a proceeding to enforce payment against Ralls County, Mo., of judgments obtained against it on railroad construction bonds similar to those involved in the *County of Macon* case. The judgment creditor sought mandamus to compel the county to levy taxes in addition to the special tax and to the general tax for corporate purposes. He relied for authority in this regard upon a Missouri statute which conferred power on the County Court and directed it to take all necessary action with respect to levying taxes to protect the credit of the county. This Court sustained the contentions of the judgment creditor in this regard and held that he was entitled to a writ of mandamus as prayed. The county urged in defense the same language from the opinion in the *County of Macon* case which is quoted and relied upon by respondents in the case at bar. In disposing of that contention this Court said, (105 U. S. 738) "The language there used may be broader than on further consideration we should be willing to agree to. That case is authority on this point only to the extent it was necessary then to decide."

Reported *sub nom* in the *Ralls* case is the case of *Lincoln County Court* v. *United States*, 105 U. S. 739. That case was on the facts identical in all respects with the *Ralls County* case *but the municipal corporation asserted as an additional ground of defense to the issuance of writ of mandamus* that the bonds upon which judgment had been obtained were not the corporate obligation of the county because they had been delivered after a registration statute had come into effect and compliance had not been had

with that statute. This Court disposed summarily of this contention by remarking that "In our opinion this is a defense that cannot be taken advantage of after judgment. As has been said in the *Ralls County* case, it was conclusively settled by the judgment, which this is a proceeding to carry into execution, that the coupons sued on were binding obligations of the county * * * and as such are entitled to payment out of any fund that can lawfully be created for that purpose."

Obviously, if the *County of Macon* case, which was relied upon by the defendant municipal corporation in both the *Ralls County* and *Lincoln County Court* cases, was a case holding to the decision sought to be attributed thereto by respondents in the case at bar, this Court would have been required to refuse enforcement of the judgments involved in those cases. The *County of Macon* case is similarly distinguished in other opinions of this Court. *Knox County Court* v. *United States ex rel. Harshman*, 102 U. S. 229, *Quincy* v. *Jackson*, 113 U. S. 332, 338, and *Franklin County* v. *German Bank*, 142 U. S. 93, 100-101.*

* In the *Franklin County* case this Court, in rejecting the contention of the defendant county that, under the authority of *Brownsville* v. *Loague*, 129 U. S. 493, and *United States* v. *County of Macon*, 99 U. S. 582, this Court had the right to inquire into the question of whether or not the claim upon which the judgment against the county sought to be enforced in that case was the corporate obligation of the county, and if not, then to refuse enforcement of the judgment, said:

> "But we know of no case which goes to the extent of holding that where a court having complete jurisdiction of the case has pronounced a decree upon a certain issue, such issue may be retried in a collateral action, even though the evidence upon which the case is heard is sent up with the record."

And further (p. 101):

> "Had the plaintiff county desired further to test the validity of these bonds, it was its duly to have appealed from this decree, * * * when the question of the validity of both issues could have been heard and determined by this Court."

It is respectfully submitted that the decision of this Court in *United States* v. *County of Macon*, 99 U. S. 582, when considered in the light of the foregoing authorities and in the light of the limited issue presented in that case, not only is not authority for the proposition which respondents advance, but, so far as the case is applicable to any issue at bar, is authority in support of the contentions of these petitioners. Petitioners ask that their judgments be included in the annual appropriation ordinance and budget of the Board of Education and that provision be made for payment thereof by levy of taxes or sale of bonds, as authorized by statute. No levy of a special tax is sought. Petitioners seek merely to compel the Board of Education to take all steps necessary to exercise powers admittedly conferred upon it for the raising of funds for the payment of its corprate obligations, including judgments. As appears from the foregoing cases, petitioners are entitled to this relief.

**Freeland v. Williams.**

*Freeland* v. *Williams*, 131 U. S. 405, did not involve a collateral attack upon a judgment, but rather merely the question whether a new right of review granted by the West Virginia constitution, violated any provision of the Fourteenth Amendment. Respondents err when they say of this case that "The question presented to this Court required *going behind* the judgment to ascertain whether or not it was of such a character as was unenforceable under the new State Constitution." This Court did not go behind the judgment for any purpose. It merely examined the judgment to ascertain whether it was within the class of judgments of which the West Virginia Constitution authorized a new remedy for review. Upon adjudging this question in the affirmative this Court then held that the Virginia courts had power to *review* the judg-

ment. It is for this proposition that the *Freeland* case has been cited by this Court as authority. *Stephens* v. *Cherokee Nations*, 174 U. S. 445, 478; *Wallace* v. *Adams*, 204 U. S. 415, 422; *Johannessen* v. *United States*, 225 U. S. 227, 241. This Court pointed out that the State constitutional provision for new review merely remedied a defect in normal process and did not create a new process. (131 U. S. 419.) The proceeding being one for direct review of the judgment, this Court further held that it was proper, as in all other cases of direct review of judgments, to inquire into the validity and merits of the claim which had been adjudicated by the judgment.

At no time since the entry of the money decrees in favor of petitioners or since the expiration of the time within which respondents could have sought review of those decrees has the Illinois Constitution been amended or has any statute been enacted awarding to respondents a new remedy for review. It is patent, therefore, that the special situation present in the *Freeland* v. *Williams* case, is not presented in the case at bar. That decision is in no way authority for the proposition now relied upon by respondents. It is to be pointed out that this Court throughout its opinion indicated that in the absence of the new remedy for review the normal rule of conclusiveness of a final judgment would have obtained.

### Wisconsin v. Pelican Insurance Co.

The next case cited by respondents is *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265. Respondents rely upon and quote a portion of the opinion, but fail to call attention to the fact that in the subsequent case of *Fauntleroy* v. *Lum*, 210 U. S. 230, 236, this Court held not only that the quoted portion of the opinion was a *dictum* but that it did not have the meaning now sought to be attributed to it by respond-

ents. In the *Pelican Insurance Co.* case this Court held merely that it did not have original jurisdiction of an action commenced in this Court by the State of Wisconsin upon a judgment for a penalty recovered by that State in one of its courts. This Court pointed out that the attempt of the State of Wisconsin to enforce the judgment in question was merely one of the steps in the course of its attempt to enforce a penalty and that this Court did not, therefore, have jurisdiction. It is clear that the quotation from the opinion of this Court appearing at pages 24-25 of respondents' answer, when viewed in the light of the narrow issue before the court, does not support the proposition for which the case is advanced by respondents. As stated above, this Court so held in *Fauntleroy* v. *Lum*, 210 U. S. 230, 236.

The *Fauntleroy* case was a suit brought in the State of Mississippi to enforce a judgment entered by a Missouri Court. The judgment was an adjudication against defendant of an alleged cause of action which arose in Mississippi out of a gambling transaction in cotton futures. By the laws of Mississippi the claim upon which the Missouri judgment was based was illegal and void. The Mississippi courts held that the Missouri judgment could not be enforced in the courts of Mississippi because the claim upon which it was based was an invalid claim under the laws of Mississippi. The case was brought to this Court on federal constitutional grounds raised in the Mississippi courts. It was contended, on the basis of the portion of the opinion of this Court in *Wisconsin* v. *Pelican Insurance Co.*, quoted at pages 24-25 of respondents' answer, that this Court had announced an exception to the general rule that a final judgment entered by a court of competent jurisdiction is conclusive of the claim and of all issues and defenses which were or which could have been adjudicated by such judgment. In rejecting this contention this Court said, through

Mr. Justice Holmes, (210 U. S. 236,) that the only issue in *Wisconsin* v. *Pelican Insurance Co.* was the narrow one whether this Court had original jurisdiction of the action and that, even if the court had reached a different conclusion in that case as to its jurisdiction, "it would not have and could not have decided anything relevant to the question before us." The court further remarked that "It is true that language was used which has been treated as meaning that the original claim upon which a judgment is based may be looked into further than Chief Justice Marshall supposed. But evidently it meant only to justify the conclusion reached upon the specific point decided, for the proviso was inserted that a court 'cannot go behind the judgment for the purpose of examining into the validity of the claim'. 127 U. S. 293. However, the whole passage was only a *dictum* and it is not worth while to spend much time on it."* A like explanation of the decision of this Court in *Wisconsin* v. *Pelican Insurance Co.* is to be found in *Carpenter* v. *Beal-M'Donnell & Co.*, 222 Fed. 453, 458.

* The court then concluded, (210 U. S. 237,) "* * * Whether the award would or would not have been conclusive, and whether the ruling of the Missouri Court upon that matter was right or wrong, there can be no question but that the judgment was conclusive in Missouri on the validity of the cause of action. A judgment is conclusive as to all the *media concludendi*, *United States* v. *California and Oregon Land Co.*, 192 U. S. 355; and it needs no authority to show that it cannot be impeached *either in or out of the state* by showing that it was based upon a mistake of law. Of course a want of jurisdiction over either the person or the subject matter might be shown. But as the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect. * * *" (Emphasis added.)

*Fauntleroy* v. *Lum* has been frequently cited with approval by this Court for the proposition held by it through Mr. Justice Holmes, the last time in *Milliken* v. *Meyer*, 311 U. S. 457, 462, where this Court said that the conclusiveness of a judgment of a court of general jurisdiction "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."

**Louisiana v. Mayor of New Orleans.**

The next case relied upon by respondents is *Louisiana* v. *Mayor, etc. of New Orleans*, 109 U. S. 285, 289. As appears from the statement of the case in respondents' answer (p. 25) this Court did not make inquiry into the validity of the claim upon which the judgment there involved was based. The *sole* question before the Court was whether the curtailment by state legislation of the taxing power of the municipal corporation against which the particular tort judgment sought to be enforced in that case had been entered was an impairment of the obligation of contract. This Court held merely that a tort judgment was not a contract within the meaning of the clause of the Federal Constitution protecting contracts from impairment by state legislation. No such question is involved in the case at bar. It is to be noted that Mr. Justice Bradley in a specially concurring opinion (109 U. S. 291) said that judgments against municipal corporations, based on purely private rights were "as much an article of property as anything else that a party owns;" and that to abrogate the remedy for enforcing such a judgment, without affording other adequate remedy in its stead, would be "to deprive the owner of its property within the meaning of the Fourteenth Amendment", that "the remedy for enforcing a judgment is the life of a judgment just as much as the remedy for

enforcing a contract is the life of a contract", and that for this reason it was important clearly to distinguish between the kind of judgment under consideration in *Louisiana* v. *Mayor of New Orleans*, "and other judgments for claims based upon the absolute right of the party."

**Ward v. Joslin.**

It clearly appears from the statement of *Ward* v. *Joslin*, 186 U. S. 142, 152, at page 25 of respondents' answer that this Court was neither called upon to nor did it inquire into the validity of the claim adjudicated by the judgment involved in that case. The action was not one against the judgment debtor to enforce the judgment against it. Rather, it was one brought against a stockholder of the judgment debtor, who was not a party to the judgment proceedings, to enforce the judgment against such stockholder on the theory that the judgment was a debt or "dues" of the corporation for which the defendant stockholder was liable under a stockholders' double liability statute making stockholders in the type of corporations involved in that suit liable to the amount of their stock for "dues" due from such corporation. The issue whether or not the judgment was a "dues" within the meaning of the stockholders' double liability statute was not a matter in issue in the judgment proceeding and the inquiry of this Court on that question was, therefore, not an inquiry into any issue which was or which could have been adjudicated by the judgment. This Court pointed out, (186 U. S. 153,) that the case was merely one in which the party seeking enforcement of the judgment was required to and did go to a source other than the judgment for the remedy he sought to invoke to his advantage against the defendant.

**Smith v. Broderick.**

*Smith* v. *Broderick*, 107 Cal. 644, 40 Pac. 1033, 1035, involved a provision of the California Constitution prohibiting a municipal corporation from incurring indebtedness beyond the revenue provided in any one year for the payment of debts of the character sought to be incurred. A city, in violation of this provision of the California Constitution, incurred obligations in excess of the revenues for that particular year. Thereafter, suit was brought upon the claims and the defendant city by formal resolution consented to the entry of judgment against it. The resolution itself was filed in the suit and judgment was entered upon the consent by default. Thereafter the City Auditor refused to approve the judgment for payment and the judgment creditor filed a mandamus proceeding against the city and the auditor to enforce the judgment. The Court held that under these circumstances it had the right to inquire into the question of the validity of the claims upon which the judgment was based.

The judgment, having been entered by consent, was not a judicial determination of the issue of the liability of the city upon the claims in question and the rules respecting the inviolability against collateral attack of final judgments entered by courts of competent jurisdiction did not apply. On this ground alone the case is clearly distinguishable from that at bar.

It appears from *Johnson* v. *Sacramento County*, 65 Cal. 481, 4 Pac. 463, that the California Court, in *Smith* v. *Broderick*, would not have inquired into the basis of the claim upon which the judgment involved in that case was entered had the issue of the liability of the city upon the claim been adjudicated against it in a contested proceeding. In the *Sacramento County* case the defendant

county attempted to attack a judgment sought to be enforced against it in a collateral proceeding on the ground that the claim adjudicated by the judgment was an indebtedness incurred in violation of the foregoing provisions of the California Constitution prohibiting the incurring of obligations for current expenses beyond the income for the current year. The Court held that this was properly an issue which was or could have been presented in the judgment proceeding, that the judgment was conclusive of the liability of the county, and that the county would not be permitted in the collateral proceeding to show that the claim was one which the county was prohibited from incurring under the California Constitution. The decision has been cited with approval in subsequent opinions of the California Supreme Court.

Another ground of distinction of the *Smith* v. *Broderick* case is that the judgment creditor in that case was not seeking an accounting of funds actually received by the municipal corporation to his own use or from which the claim was properly payable in the first place, but rather was seeking to establish the general liability of the city on the original claims, so as to enable him to reach other assets of the city. *Smith* v. *Broderick* would be somewhat like the case at bar if the petitioners had sued on their tax anticipation warrants and had recovered a judgment against the Board of Education for the full amount of the principal and interest due on such warrants according to their terms. However, admittedly, that is not this case. These judgments were limited to the proceeds of tax collections actually received by the Board to the use of petitioners.

**Brunson v. Caskie.**

*Brunson* v. *Caskie*, 127 Ga. 501, 56 S. E. 621, was an action against a county for damages suffered by plaintiff as the result of a defective roadway which had been negligently maintained by the county authorities. The Georgia Constitution limited the power of counties to levy taxes to certain purposes which did not include either the payment of judgments generally or the payment of damages caused by defective roadways. The county having refused to pay the judgment, mandamus was brought to compel the issuance by the county of a warrant on the County Treasurer for the payment of the judgment. Citing *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, and *United States* v. *County of Macon*, 99 U. S. 582*, the Georgia Court held, (56 S. E. 622,) that "Putting the alleged claim into judgment gives the plaintiff no new rights, *in respect to the means of payment*, which did not exist before the judgment was obtained." (Emphasis added.) This is merely another case such as *Brownsville* v. *Loague***. Since there was no power under the Georgia Constitution by which the county could levy taxes for the payment of judgments generally, it was necessary for the judgment creditor to attempt enforcement of his judgment by process not contained in the judgment itself. Consequently, as this Court held in *Brownsville* v. *Loague*, 129 U. S. 493, it was in turn necessary for the court to inquire into the nature of the claim adjudicated by the judgment to see whether or not, independent of the judgment, it was of a character for the payment of which taxes were authorized to be levied by the Georgia Constitution.

The case is ably discussed and distinguished on these

* Discussed at pages 30-34 and 35-38 of this reply.

** See pages 28 to 30 of this reply. *Brownsville* v. *Loague*, 129 U. S. 493.

grounds by the Supreme Court of Kansas in *Equitable Investment Trust Co.* v. *Board of Commissioners*, 86 Kans. 708, 121 Pac. 1097, 1098. That case involved a judgment against a county based upon a claim which the court recognized was not a corporate liability of the county. The Court held that while it was true that the claim was not a valid one, still it had "sufficient plausibility to challenge the attention of the court" which entered it; that this was enough to vest that court with jurisdiction; and that the judgment was conclusive of the question of the obligation of the county on the claim and of the duty of the county to pay the judgment. Counsel for the county contended, (as do respondents at bar,) that inasmuch as it appeared from the record of the judgment that the claim asserted imposed "no liability whatever on the county" no aid should be given to enforce the judgment. *Brunson* v. *Caskie* and also *Brownsville* v. *Loague* were cited in support of the county's position. The Kansas Supreme Court distinguished both cases on the grounds above discussed* and concluded with the comment that "The difficulty with this reasoning is that it denies the conclusive effect of the judgment. It conflicts with the proposition that the judgment decides the law as well as the facts, and determines that county is liable to the plaintiff."

The Kansas Supreme Court pointed out that the quasi municipal corporation involved in that case had power to levy taxes or to apply general revenues to the payment of judgments generally and that this fact alone distinguished the case from *Brunson* v. *Caskie*. This ground of distinction likewise applies in the case at bar. By Section 135½ of the School Act the Board of Education is authorized and required to include in its annual appropriation ordinance such sums of money as may be required to defray all

* See pp. 42, 28-30 for discussion of *Brownsville* v. *Loague*.

necessary expenses of said Board to be paid or incurred during the fiscal year, including "all final judgments" and to levy taxes for the purpose of paying the items included in such annual appropriation ordinance. (Ill. Stats., 1943, ch. 122, par. 158a.) In addition, the Board is authorized by the Act of June 12, 1937 (Appendix, pp. 31-32) to issue bonds "to pay judgment indebtedness based upon order or decree of any court of record heretofore or hereafter entered" except judgments rendered for money due upon unpaid claims for services rendered, for supplies or for materials. It is submitted, therefore, that the limited doctrine of *Brunson* v. *Caskie* has no application in the case at bar.

The distinctions above pointed out and elaborated upon by the Supreme Court of Kansas in the *Equitable Investment Trust* case, (121 Pac. 1097, 1098,) as well as other grounds of distinction, are discussed at length in the case note in 9 L. R. A. (N. S.) 1002.

Furthermore, even assuming that *Brunson* v. *Caskie* is authority for the point for which that case is cited by respondents, such a holding would be squarely contrary to the decisions of the Supreme Court of Illinois in *Moore* v. *Town of Browning*, 373 Ill. 583, 585, 586, 588, 27 N. E. (2d) 533, 535, 536; *People* v. *L. & N. R. Co.*, 350 Ill. 274, 277, 183 N. E. 233, 235; *Marabia* v. *Thompson Hospital*, 309 Ill. 147, 157, 140 N. E. 836, and *Carney* v. *Village of Marseilles*, 136 Ill. 401, 407, 26 N. E. 491, 493, and to the decision of the Appellate Court of Illinois in *Seither & Cherry Co.* v. *Board of Education*, 283 Ill. App. 392, 403.

We respectfully submit that it appears from the foregoing analysis of the cases relied upon by respondents that none of those cases is authority for the proposition that the court in a mandamus proceeding brought against a municipal corporation to enforce a judgment against the

corporation may inquire into the question whether the claim adjudicated by the judgment is one which the corporation could have incurred in the first instance by virtue of the Illinois Constitution or by virtue of a statute or a rule of law. Nor are they authority for the proposition that a court may enforce or refuse to enforce a judgment against a municipal corporation, depending upon the view of the court as to whether the liability could or could not have been incurred in the first instance.

The authorities cited by respondents support the opposite of this proposition. Therefore, the Supreme Court of Illinois, in disposing of the case at bar on this ground, placed its decision upon a non-federal ground which was wholly untenable and without merit.

We respectfully submit that this case falls within the rule frequently announced by this Court: that the Fourteenth Amendment assures to the citizen the privilege of having his federal constitutional rights and immunities judicially declared and protected when properly invoked and this Court has the province to inquire whether the decision of the State court rests upon a fair and substantial basis or one merely illusory and plainly untenable. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282; *Ward* v. *Love County*, 253 U. S. 17, 22.

## II.

### Second Alleged Adequate Non-Federal Ground of Decision Alleged Presents Inadequacy of Funds.

At pages 28-29 of their answer respondents assert that the added ground of decision of the Supreme Court of Illinois sustaining the defense of the Board of Education of the present insufficiency of funds available to it, over and above moneys allegedly already appropriated for payment

of other liabilities and current expenses, to pay the money decrees of petitioners, is an adequate, tenable and independent non-federal ground of decision which rendered it unnecessary for the Supreme Court of Illinois to determine the federal questions raised.

In their mandamus proceeding these petitioners prayed for the issuance of a writ of mandamus commanding the Board and its officers to do every act and thing imposed upon them by law to bring about the payment of the several money decrees and, among the courses open to the Board of Education to this end, to include the judgments in its annual budget and appropriation ordinance as expressly authorized by statute and levy taxes to raise funds to meet the budgeted items, including the judgments; or to issue bonds under the authority of the Act of July 12, 1937 (Appendix to Pet., p. 31) to raise funds for the payment of the judgments; or that such other and further or different relief be granted as the nature and exigencies of the case should require.

The mere formal defense advanced by the Board in its answer that all funds available to it at the time it filed its answer had been budgeted and appropriated by it to the payment of liabilities and current expenses exclusive of the judgments, goes to but part of the relief prayed in the petition and does not, even if properly sustainable (which it is not) serve as an adequate, independent basis for disposition of the entire case.

It was within the jurisdiction and discretion of the Supreme Court of Illinois to fix such terms in the granting of the writ of mandamus as would enable the Board of Education to meet its obligations to these judgment creditors without interfering with its obligation to maintain the public schools. Pet., pp. 50-51; *East St. Louis* v. *Amy*, 120 U. S. 602; *United States* v. *City of Key West* (C. C. A. 5th),

78 Fed. 88, 93-94. But when the Court refused to award any writ whatsoever to petitioners and held they could not be enforced by any means it deprived them of the only remedies they had for enforcing their decrees against the Board of Education, destroyed the value of their decrees, and as a consequence deprived them of their property in their decrees without due process of law in violation of the Fourteenth Amendment. The disposition of the case made by the Supreme Court of Illinois was not a mere temporary withholding of the remedy of these petitioners but was a permanent denial to them of one of their remedies to enforce the payment of the decrees. Unless the decision of the Supreme Court of Illinois is reversed the decrees of these petitioners are mere scraps of paper.

Aside from these considerations the mere formal allegation of the Board in its answer in the mandamus proceeding of want of present funds is not, under the applicable law in Illinois, a sufficient defense. The Illinois authorities require that a formal allegation of want of funds must be supported by specific averments of fact from which the adequacy of the defense of want of funds will appear. *City of Chicago* v. *People*, 215 Ill. 235, 237; *People* v. *City of Chicago*, 378 Ill. 479, 484-485. In the first of these cases the Supreme Court of Illinois said: "When a petition for a writ of mandamus is filed, the answer of the respondent must state positive and definite facts upon which it relies in defense. The conclusions of the pleader are not sufficient, and if the answer consists merely of general statements and conclusions the relief will be granted." None of the authorities cited at page 29 of respondents' answer to the petition are at variance with the foregoing decisions of the Supreme Court of Illinois. Each of the cases relied upon by respondents was a case in which it appeared, either from proper allegations of altimate fact set forth in the answer of the municipality or from the evidence

adduced in the trial, that no funds whatsoever were available or could be made available by taxation to discharge the obligation sought to be enforced.

## III.

### Attempt of Respondents to Distinguish the Authorities Relied Upon by Petitioners.

At pages 29-35 of their answer respondents attempt to distinguish *some* of the authorities cited to this Court in the petition.

It is first asserted as a general ground of distinction of all the authorities cited by these petitioners that in none did the defendant municipality have power to create the debt or obligation adjudicated by the judgment, or to levy taxes for its payment.

It is a sufficient answer to this contention to say that not only is this distinction one wholly untenable and without merit, but that in several of the cases relied on by petitioners the claim adjudicated by the judgment was one which the municipal corporation had no power to incur in the first instance. *Moore* v. *Town of Browning*, 373 Ill. 583, 585, 586, 588, 27 N. E. (2d) 533, 535, 536; *People* v. *L. & N. R. R. Co.*, 350 Ill. 274, 277, 278, 183 N. E. 233, 235; *Town of Lyons* v. *Cooledge*, 89 Ill. 529, 534. This is likewise true of other authorities relied upon by petitioners in the Supreme Court of Illinois and with respect to which that Court made the same erroneous comment now sought to be applied by respondents to additional authorities relied upon by petitioners. (See cases set forth in opinion of Supreme Court of Illinois at R. 74.) Petitioners in their petition for rehearing called attention to this misstatement of the Court and to the fact that the authorities cited by petitioners to which the Court referred were cases

in which the claims adjudicated by the judgments were ones which had been incurred after the defendant municipal corporation had reached its constitutional debt limit and that therefore they were cases involving adjudications against various municipal corporations of claims which they had no power to incur in the first instance.

It is noteworthy that the Supreme Court of Illinois cited no case and the respondents have referred this Court to no case which supports any such distinction as has been advanced.

It will further unduly lengthen this reply to discuss in detail the erroneous grounds advanced by respondents for distinguishing other cases relied upon by petitioners. Each of the cases cited to this Court in the petition is authority for the particular point for which it is cited. Respondents in attempting to distinguish petitioners' cases have either erroneously stated the holdings in those cases or erroneously attributed to petitioners the advancement of those cases for points other than those for which they were actually cited by petitioners. We shall undertake discussion of but two instances which are typical of others appearing in respondents' answer.

For example, at page 33, respondents attempt to distinguish *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, 721, on the ground that this Court held in that case "that a court has a right to examine the judgment pleaded in the mandamus proceeding for the purpose of determining *whether the municipality had the right originally to create the debt.*" The fact is that this Court held to the contrary of this proposition.

In that case plaintiff had obtained judgment upon certain warrants issued by defendant for building a bridge. The warrants were payable from a special tax fund for a particular year and from surplus general funds for speci-

fied years. The warrants not being paid, plaintiff obtained a general judgment against defendant. Pursuant to an existing statute the judgment directed defendant to levy sufficient taxes to pay the judgment. The judgment was not paid nor the taxes levied. Suit was commenced by plaintiff for writ of mandamus to compel the special tax levy to be made. In the meantime the statute authorizing the special tax was repealed. The plaintiff contended such repeal violated the impairment of the obligation of contract provision of the Constitution of the United States.

The defendant municipality contended the judgment was open for inquiry (1) as to whether the claim adjudicated was a valid obligation of the municipality, and (2) whether the judgment could be enforced at all since the original claim was payable from special tax funds no longer in existence.

This Court held that because of the issue raised by plaintiff of impairment of the obligation of contract the Court had to inquire whether the court which entered the judgment regarded it as one entered on a contract. It appearing that the court which entered the judgment had so regarded plaintiff's claim, this Court then went on to say, in answer to the contention of defendant that the validity of the claim as a corporate obligation of the municipality was also open to inquiry (111 U. S. 721): "The inquiry, however, which may be thus instituted into the nature of the original cause of action, does not, where the judgment was rendered upon a contract, *authorize a re-examination of the validity of the contract, or the propriety of the judgment*: That would involve a retrial of the case." (Emphasis added.)

The Supreme Court of Louisiana had sustained the second defense,—that the funds from which the original claim was payable being no longer in existence, the municipality

could not be required to levy new taxes to pay the judgment. This Court held that this question was likewise finally adjudicated by the judgment and was not a subject open for inquiry, saying in this regard (111 U. S. 721): "The absolute liability of the parish upon such warrants was therefore no longer an open question, and the inquiry whether the judgment was founded upon a contract was answered. Further testimony on the subject was irrelevant and incompetent. The Supreme Court, however, held that the designation of the funds out of which the warrants were to be paid rendered the parish liable only if the funds were sufficient, notwithstanding the terms of the judgment. *Its conclusion in this respect was wholly unauthorized, because founded upon evidence which it could not legitimately consider.* The judgment being absolute, and the plaintiff therein being by law entitled at the time to a decree that the assessing and collecting officers of the parish should assess and collect a tax sufficient to pay it, and such decree having been entered, and those officers having failed in their duty, the relator was entitled to the writ prayed." (Emphasis added.)

The other example is *Drainage District* v. *Highway Com'rs.*, 238 Ill. 521. Respondents state as a ground for distinguishing this case that the Supreme Court of Illinois "examined the judgment to determine whether or not the obligation on which said judgment was based was a valid one." The fact is the Court did exactly the contrary. The case involved a mandamus judgment issued by a county court, which in Illinois is a court of limited jurisdiction, which directed the levy of certain special assessments confirmed under a judgment of confirmation previously entered by the county court. The jurisdiction of the county court was attacked because certain prerequisites of jurisdiction of the court to enter the confirmation judgment did not appear on the face of the judgment record, *as re-*

*quired by statute.* The Supreme Court of Illinois held that the judgment of a court of limited jurisdiction was subject to attack where the requisites of the court's jurisdiction did not appear on the face of the record. But the court also held that had the requisite jurisdictional facts been recited in the judgment record, "such finding, like any other judicial determination, cannot be contradicted, varied or explained." (238 Ill. 524.)

## Conclusion.

We respectfully submit that respondents have not advanced in their answer a single argument or a single case militating in any way against the propositions urged by petitioners in their petition for writ of certiorari. The answer serves to point up and emphasize the fact that all of the propositions advanced by petitioners in their petition are sound, are fully supported by decisions of this Court and other courts of highest authority cited in the petition, and that for the reasons advanced in the petition the Supreme Court of Illinois has by its decision in this case and in the companion cases deprived these petitioners of their property without due process of law and has denied to petitioners the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, and has either denied or failed to give due recognition to substantial rights of petitioners claimed under the Constitution of the United States. The alleged non-federal grounds of decision upon which the Supreme Court of Illinois placed its decision of the rights claimed by these petitioners are supported by no authorities whatsoever. Every case urged by respondents in support of the grounds of decision establish their complete lack of merit and substantiate fully the position of these petitioners that the non-

federal grounds of decision are illusory, untenable and unsubstantial.

Aside from this fact the non-federal grounds of decision, irrespective of their merit, are not such as to permit the Supreme Court to pass upon the merits of the litigation and the rights of petitioners, without passing upon the claims of petitioners under the Constitution of the United States. The answer serves to emphasize not only that this case involves substantial federal questions of importance which merit decision by this Court, but also that petitioners are entitled to the judgment of this Court as to whether the federal rights claimed by them were denied or not given due recognition by the Supreme Court of Illinois.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

## No. 330

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. RECONSTRUCTION FINANCE CORPORATION, ETC., AND 210 OTHER RELATORS,

*Petitioners,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,

*Respondents.*

## PETITION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

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## PETITION FOR RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable The Supreme Court of The United States:*

The People of the State of Illinois, on the relation of Reconstruction Finance Corporation, a corporation of the United States of America created by Act of Congress, and 210 other judgment creditors of the Board of Education of the City of Chicago, Illinois, a body politic and corporate, relators in a certain mandamus proceeding commenced in the Circuit Court of Cook County, Illinois, respectfully pray that this Honorable Court reconsider the petition for writ of certiorari and the briefs in support thereof, that it set aside its order of October 9, 1944,

denying said petition, and that it award the writ of certiorari as prayed in said petition.

By their answer to the petition respondents did not challenge, and so it must be assumed that they concede, that

(1) rights and interests under the Constitution of the United States were duly claimed and plainly asserted by petitioners in the state courts, as set forth in the petition at pages 6 to 9;

(2) the federal constitutional questions presented and the constitutional rights claimed were substantial, as presented in the petition at pages 12 to 16 and in the brief at pages 31 to 38; and

(3) the claims of rights and interests under the federal Constitution urged by petitioners were not decided or given due recognition by the Supreme Court of Illinois, as pointed out in the petition at pages 6, 7-8 and 16 and in the brief at pages 28-29, and 39-46.

Respondents' contention that the petition for writ of certiorari should be denied rests solely on the argument that the Supreme Court of Illinois decided the case on non-federal grounds adequate to sustain its judgment, independent of federal constitutional questions. These petitioners are not advised of the grounds on which this Honorable Court denied the petition, and so they must assume that this Court reached the conclusion, in line with the answer of respondents, that (a) the non-federal grounds upon which the Supreme Court of Illinois placed its decision are tenable and substantial, and (b) that the rights and interests of petitioners can be adjudicated without a decision of the federal constitutional questions which were plainly asserted by petitioners.

We think we have demonstrated in our reply to the answer that the opposition of respondents to the granting

of the petition rests on contentions as untenable as the arguments the Supreme Court of Illinois used to evade deciding the real issues in this case. If the non-federal grounds upon which the Supreme Court of Illinois placed its decision are unsound and unsubstantial, or if the rights and interests of petitioners cannot be adjudicated without a decision of the federal constitutional questions asserted by petitioners, then the right to a review by this Court is clear under its decisions. *Ward* v. *Love County*, 253 U. S. 17, 22; *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591-594; *Rogers* v. *Alabama*, 192 U. S. 226, 230.

In *Ward* v. *Love County* the defendant quasi-municipal corporation challenged the jurisdiction of this Court on the ground that the State Supreme Court had put its judgment entirely on independent non-federal grounds which were broad enough to sustain the judgment without reference to the constitutional questions presented. In disposing of this question, this Court said (253 U. S. 22-23):

> "The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. *Whether the right was denied, or not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way.* It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. With this qualification, it is true that a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed

by us. *But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof.*" Emphasis supplied.

We respectfully suggest that whether the non-federal grounds upon which the Supreme Court of Illinois based its decision are tenable and substantial and whether the rights and interests of petitioners can be adjudicated without a decision of federal constitutional questions asserted by petitioners, are in themselves substantial federal questions which should move this Court to exercise its judicial discretion to bring the case up for review. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 678, 682; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540; *C. B. & Q. Ry.* v. *Drainage Comrs.*, 200 U. S. 561, 580.

A federal constitutional question squarely presented by this record, which has not been settled by a decision of this Court, is whether a final judgment is property protected by the Fourteenth Amendment and whether a denial of the writ of mandamus to enforce the judgment deprives the holder of his property in his judgment without due process of law. This point is presented at pages 9 and 12 of the petition, page 31 of the brief, and pages 21, 23, 25 and 44-45 of the reply. Petitioners submit that the rule prohibiting inquiry into the merits of their decrees (*Milliken* v. *Meyer*, 311 U. S. 457, 462; *Fauntleroy* v. *Lum*, 210 U. S. 230, 236; *Franklin County* v. *German Bank*, 142 U. S. 93, 100; *Lincoln County Court* v. *United States*, 105 U. S. 739; *Cooper* v. *Reynolds*, 77 U. S. 308, 310), is one of the attributes of the decrees which they asserted could not be impaired without denying the protection of their property rights afforded them by the Fourteenth Amend-

ment and that that claim has not been decided. The Supreme Court of Illinois disregarded this attribute of the decrees and reexamined the issues settled by the decrees without giving any consideration to the question whether this action deprived these petitioners of their property in their decrees without due process of law. Since the question, presented by this record, whether a final judgment entered by a state court of general jurisdiction is property protected by the Fourteenth Amendment is open in this Court, these petitioners are entitled to the judgment of this Court on that question.

The refusal of the Supreme Court of Illinois to decide the federal constitutional questions presented was just as much a denial of petitioners' rights under the Constitution of the United States as if it had decided the questions erroneously. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282; *Chapman* v. *Goodnow's Admr.*, 123 U. S. 540, 548.

In *Lawrence* v. *State Tax Commission* the State Supreme Court placed its decision on non-federal grounds and declined to decide the claims under the Constitution of the United States, but this Court held that it had jurisdiction to review the case to determine whether the grounds of decision of the State Supreme Court were broad enough to support the judgment without a decision of the federal constitutional questions, saying (286 U. S. 282):

> "*But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked.* Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. Upon one

> of the alternative assumptions made by the court, that the amendment is discriminatory, appellant's constitutional rights were infringed when the tax was levied upon him, and state officers acting under the amendment refrained from assessing the like tax upon his corporate competitors. If the Constitution exacts a uniform application of this tax on appellant and his competitors, *his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it*, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked." Emphasis supplied.

The money of these petitioners in the treasury of the Board of Education was appropriated by the Board to purposes other than payment of tax anticipation warrants held by petitioners, notwithstanding the Board by the warrants (R. 15-17, No. 331, *Lewis* v. *Board*) had pledged these moneys to the payment of the warrants and had contracted with petitioners pursuant to statute (Sec. 132, School Act, App. to Petition, p. 29) to set aside the proceeds of collections of the anticipated and assigned taxes and hold them for the payment of the warrants. (Reply to Answer, pp. 9-11.) These petitioners sought an accounting in regular equity proceedings in the courts of Cook County, Illinois, and obtained decrees against the Board of Education ordering the Board to pay to them the moneys belonging to them and no one else, which the Board had actually received into its treasury to their use and had not paid over to them. (R. 9-19, 23, 26, 31, 41, 44, 45, 47, 49; Petitioners' Brief, pp. 22-26.) When these decrees were not paid, petitioners sought by mandamus to compel payment of the decrees, (R. 1-39,) and this remedy was denied to them by the Circuit Court of Cook County, Illinois (R. 63) and by the Supreme Court of Illinois. R. 65-76.

By the judgment of the Supreme Court of Illinois petitioners are deprived not only of their property in their decrees without due process of law, in violation of the Fourteenth Amendment, but of their money which the Board of Education took from them and gave to others in the first instance. Reply to Answer, pp. 9-19.

A mere statement of the facts makes it crystal clear that these petitioners have had their money taken from them and given to others by direct action of agencies of the State of Illinois and that they have been denied any compensation for the property taken. These petitioners are the victims of a chain of events which they could not foresee when they purchased the tax anticipation warrants, duly issued for its benefit by the Board of Education in 1929, and which occurred after they bought the warrants. Once having invested their money in a security payable from a limited fund, these petitioners' fortunes were in the hands of the public authorities and they had no control over the extension and collection of the taxes levied and the distribution of the proceeds of such collections received into the treasury of the Board of Education to their use. See analysis of applicable statutes in petition for rehearing in *Lewis* v. *Board*. R. 252-254.

When the Board of Education issued its tax anticipation warrants in 1929 pursuant to statutory authority, the assessed value of property in the school district was $4,250,437,799, (R. 166, No. 331, *Lewis* v. *Board*,) and the warrants issued amounted to less than seventy-five per cent of the taxes levied. (R. 186, No. 332, *Hutchinson* v. *Board*.) If the taxes had been extended, as then contemplated by the Board of Education and the purchasers of its tax anticipation warrants, and put in collection in normal course, enough moneys would have been collected to pay the warrants in full. (R. 53-54, No. 332, *Hutchinson* v. *Board*.)

Nearly two years after the warrants were sold, the State Tax Commission of Illinois reassessed the real estate in Cook County, Illinois, and reduced the assessed valuation of the property in the school district $555,939,093, and the reassessment delayed for the same period the extension of 1929 taxes. (R. 166, No. 331, *Lewis* v. *Board.*) When the taxes were extended in 1931, it was evident that enough taxes could not be collected to pay the warrants in full. (R. 167, No. 331, *Lewis* v. *Board.*) The tax anticipation warrants were payable only out of the proceeds of collections of the taxes against which they were issued, (Sec. 132, School Act, App. to Petition, p. 29; warrant provisions, R. 15-17, No. 331, *Lewis* v. *Board.*) and when it appeared to the Board of Education that the limited fund would not be sufficient to pay the warrants in full, the proceeds of collections pledged to the payment of the warrants and received by the Board into its treasury should have been prorated among all the holders. (App. to Petition, pp. 22-28; *Norfolk & Western Ry. Co.* v. *Board of Education*, 14 Fed. Supp. 475, aff. 88 Fed. (2nd) 462, reaff. 114 Fed. (2nd) 859; *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 339, 342, 183 N. E. 337, 341-342.) This was not done. The Board paid some of the warrants in full and left those held by petitioners unpaid. R. 25, 54, 134, No. 332, *Hutchinson* v. *Board.*

It is difficult to conceive a case where it is more clear that the property of one has been taken by public authority and given to another. (Brief, pp. 32-36; Reply, pp. 9-11.) This Court has repeatedly held that this constitutes depriving a person of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Ward* v. *Love County*, 253 U. S. 17, 24; *C. St. P. M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162, 167; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 78-80.

We desire to make it clear, if there is any doubt on the point in the mind of this Court, that petitioners in their accounting suits asked only for money which belonged to them and to no one else and that the accounting decrees gave them only their prorata shares of the proceeds of tax collections actually received by the Board of Education into its treasury to their use. ((Petitioners' Brief, pp. 39-40; Reply Brief, pp. 9-11.) They have never contended that the Board was under obligation to pay their warrants according to their terms, as the Supreme Court of Illinois assumed. See Petition for Rehearing in Supreme Court of Illinois in this case, R. 81-82, 83, and in *Lewis* v. *Board*, No. 331, R. 249-281, where the point is fully discussed under Division I, pp. 2 to 10 of the petition.

The judgment of the Supreme Court of Illinois does not rest on substantial non-federal grounds. Petitioners' Brief, pp. 46-51; Reply Brief, pp. 19-25, 45-48.

The mere assertion of the Supreme Court of Illinois that it had power to inquire into whether or not the claims adjudicated in the accounting suit were corporate obligations of the Board and to grant or deny enforcement of the decrees depending upon its decision of that question, is not an adequate non-federal ground of decision which rendered it unnecessary to pass on federal constitutional questions presented. Assuming that the Supreme Court of Illinois had the right, in the face of petitioners' claims under the Constitution, to inquire into the validity of the claims adjudicated by the decrees, (which it did not, Brief, p. 31,) that Court could not have determined the claims adjudicated without determining the rights and interests of petitioners under the Constitution of the United States plainly claimed and strongly asserted by them in the accounting suits to be inherent in the claims adjudicated against the Board. (Reply, pp. 19-25.) When the Board of Education failed to account to peti-

tioners for moneys received by the Board into its treasury to their use, and paid moneys belonging to them over to others, it deprived petitioners of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

In *Ward* v. *Love County*, 253 U. S. 17, certain lands, which by federal law were exempt from taxation, were assessed and the proceeds of collections of taxes were received into the county treasury. Among other defenses the county contended that the taxes were voluntarily paid and could not be recovered and that the tax moneys had been paid over by the county to other municipal bodies and that the county could not be required to compensate the rightful owners for their losses. This case is in many respects like that at bar. The Board of Education received into its treasury moneys admittedly belonging to petitioners and paid these moneys out to others. In ruling against the contentions of Love County, this Court said, quoting from other decisions (p. 24):

> " 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' "

As to the case under consideration the Court said (p. 24):

> "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.
>
> "If it be true, as the Supreme Court assumed, that a portion of the taxes was paid over, after collection, to the State and other municipal bodies, we regard it as certain that this did not alter the county's liabil-

ity to the claimants. The county had no right to collect the money, and it took the same with notice that the rights of all who were to share in the taxes were disputed by these claimants and were being contested in the pending suits. In these circumstances it could not lessen its liability by paying over a portion of the money to others whose rights it knew were disputed and were no better than its own. *In legal contemplation it received the money for the use and benefit of the claimants and should respond to them accordingly.*" Emphasis supplied.

When the Supreme Court of Illinois added the makeweight justifying its denial of the writ of mandamus on the ground of present inability of the Board to provide the funds to pay the decrees entered against it in the accounting suits, it had already decided that the decrees were unenforceable against the Board of Education and that petitioners were not entitled to process to collect them. (R. 72, 75.) The Supreme Court of Illinois did not withhold the writ of mandamus because of a temporary situation without prejudice to petitioners to renew their request for a writ at a later period, but it decided that the petitioners are foreclosed now and forever from enforcing the payment of their decrees. Brief, pp. 46-51; Reply, pp. 45-48.

However the rights and interests of petitioners are viewed, it is impossible to adjudicate these rights and interests without deciding the federal constitutional questions asserted by them at every stage of this litigation. The Supreme Court of Illinois failed and refused to pass upon the claims made by petitioners under the Fourteenth Amendment to the Constitution of the United States. (Petition, pp. 6, 7-9, 16; Brief, pp. 51-52. See also Petition for Rehearing in *Leviton* v. *Board* in the Supreme Court of Illinois, which is the ruling case in this litigation, R. 249-281, No. 331, *Lewis* v. *Board*.) Petitioners contend that

their case cannot be decided without passing upon the federal constitutional questions presented. (Petition, pp. 12-18; Brief, pp. 30, 40-41; Reply Brief, pp. 22-24.) These petitioners have been denied their day in court on their claims under the federal Constitution and their only hope of relief lies in a review by this Court. The federal constitutional questions are clearly and aptly presented and are vital and substantial.

Petitioners contend in all earnestness that this is a case which presents questions of such public importance that this Honorable Court should be moved to exercise its judicial discretion to review it, and they humbly pray a reconsideration of their petition for writ of certiorari and the awarding of the writ so that they may have their claims and interests under the Fourteenth Amendment to the Constitution of the United States considered and determined.

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CERTIFICATE OF COUNSEL.

On behalf of all petitioners and their several counsel we certify that the foregoing motion for reconsideration of Petition for Writ of Certiorari is presented in good faith and not for purposes of delay.